IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1053

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures,
Petitioner,

vs.

THE RATH PACKING COMPANY, etc., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of 39 States and Attorneys General as Amici Curiae in Support of Petitioner Joseph W. Jones

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Jurisdictional Statement

This Honorable Court has granted the petition of Joseph W. Jones for a Writ of Certiorari. This brief, *amicus curiae,* is respectfully submitted by the following 39 States, State Officers and Attorneys General pursuant to Rules 42(2) and (4) of this Court: William J. Baxley, Attorney General of *Alabama*; Avrum Gross, Attorney General of *Alaska*; Bruce E. Babbitt, Attorney General of *Arizona*; The State of *Arkansas ex rel.*, Jim Guy Tucker, Attorney General; Evelle J. Younger, Attorney General of *California* and L. T.

Wallace, Director of the California Department of Food and Agriculture; J. D. MacFarlane, Attorney General of *Colorado*; Richard R. Wier, Jr., Attorney General of *Delaware*; Robert L. Shevin, Attorney General of *Florida* and Doyle Conner, Florida Commissioner of Agriculture; The State of *Georgia*; The State of *Hawaii*, George Mattimoe, Director, Department of Agriculture, Division of Weights and Measures; Wayne L. Kidwell, Attorney General of *Idaho* and Idaho Department of Agriculture; William J. Scott, Attorney General of *Illinois;* Curt T. Schneider, Attorney General of *Kansas;* Robert F. Stephens, Attorney General of *Kentucky*; The State of *Louisiana*, Department of Justice, William J. Guste, Jr., Attorney General; The State of *Maine*, by Joseph E. Brennan, Attorney General; Francis B. Burch, Attorney General of *Maryland*; The Commonwealth of *Massachusetts*, Francis X. Bellotti, Attorney General; The State of *Michigan*, Frank J. Kelly, Attorney General; The State of *Mississippi*, by A. F. Summer, Attorney General; The State of *Missouri*, John C. Danforth, Attorney General; Robert L. Woodahl, Attorney General of *Montana*; Paul L. Douglas, Attorney General of *Nebraska*; Robert List, Attorney General of *Nevada;* The State of *New Hampshire*, David H. Souter, Attorney General; Toney Anaya, Attorney General of *New Mexico;* Rufus L. Edmisten, Attorney General of *North Carolina;* Allen I. Olson, Attorney General of *North Dakota;* John M. Stackhouse, Director, *Ohio* Department of Agriculture; The State of *Oklahoma, ex rel.* Larry Derry-

berry, Attorney General; The State of *Oregon*; Daniel R. McLeod, Attorney General of *South Carolina;* William J. Janklow, Attorney General of *South Dakota*; John L. Hill, Attorney General of *Texas*; Vernon B. Romney, Attorney General of *Utah*; The Commonwealth of *Virginia*, Virginia Department of Agriculture and Commerce, by Andrew P. Miller, Attorney General; *Washington* State Department of Agriculture, by Slade Gorton, Attorney General; Chauncey H. Browning, Jr., Attorney General of *West Virginia*; V. Frank Mendicino, Attorney General of *Wyoming*. (Amici curiae are sometimes referred to *infra* as States.)

The States, organizations and law enforcement officers listed in footnote 1 support the position of amici set out in this brief.[1]

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[1]The following States, organizations and law enforcement officers support the position of amici curiae:

States:

Minnesota Department of Public Service; William F. Hyland, Attorney General of *New Jersey; Pennsylvania* Department of Agriculture, Raymond J. Kerstetter, Secretary; Edward S. Porter, Commissioner of Agriculture for the State of *Tennessee*.

Louis J. Lefkowitz, Attorney General of New York, is filing a separate amicus curiae brief in support of petitioners.

National Organizations:

American Farm Bureau Federation; Center for Consumer Affairs, University of Wisconsin—Extension, Milwaukee, Wisconsin; National Conference on Weights and Measures; National Consumers Congress; National Grange (the American Farm Bureau Federation and the National Grange together have as members the majority of America's farmers); National Scale Men's Association; Scale Manufacturers Association, Inc.

Regional and State Organizations:

Associated Dairymen (California); Associated Milk Producers, Inc.; California Association of Weights and Measures Officials; California Cattlemen's Association; California Citizen Action Group; California Farm Bureau Federation; California State

(This footnote is continued on next page)

Interest of Amici Curiae

This case presents for resolution by this Court crucial questions concerning the power of the States and the proper relationship between the States and the federal government in our *federal* system.

Grange; Consolidated Milk Producers for San Francisco; Consolidated Milk Producers of Tulare County (California); Consumers Cooperative of Berkeley, Inc.; Federated Dairymen (California); Greenbelt Consumer Services, Inc., Silver Springs, Maryland; Hanover (New Hampshire) Consumer Cooperative Society, Inc.; League of California Milk Producers; Mid-America Dairymen, Inc. (Missouri); Milk Producers Council (California); Producers' Market Milk Association (California); Western Dairymen's Association (California).

California Law Enforcement Officers:

D. Lowell Jensen, District Attorney, Alameda County; Thomas L. Kelly, District Attorney, Alpine County; Guy E. Reynolds, District Attorney, Amador County; Kenneth H. Leach, District Attorney, Butte County; Joseph W. Kiley, District Attorney, Calaveras County; Robert F. Weir, District Attorney, Del Norte County; Terrence M. Finney, District Attorney, El Dorado County; Noble Sprunger, County Counsel, El Dorado County, William A. Smith, District Attorney, Fresno County; L. H. Gibbons, District Attorney, Inyo County; Ralph B. Jordan, County Counsel, Kern County; Albert M. Leddy, District Attorney, Kern County; Charles D. Haughton, County Counsel, Lake County; David L. Luce, District Attorney, Lake County; Harold L. Abbott, District Attorney, Lassen County; John K. Van de Kamp, District Attorney, Los Angeles County; Bruce Bales, District Attorney, Marin County; Douglas J. Maloney, County Counsel, Marin County; Duncan M. James, District Attorney, Mendocino County; Russell M. Koch, County Counsel, Merced County; John P. Baker, District Attorney, Modoc County; James D. Boitano, District Attorney, Napa County; Ronald L. MacMiller, District Attorney, Nevada County; Cecil Hicks, District Attorney, Orange County; Gerald E. Flanagan, District Attorney, Plumas County; Byron C. Morton, District Attorney, Riverside County; John M. Price, District Attorney, Sacramento County; Edwin L. Miller, Jr., District Attorney, San Diego County; Joseph Freitas, District Attorney, City and County of San Francisco; Joseph H. Baker, District Attorney, San Joaquin County; Robert N. Tait, District Attorney, San Luis Obispo County; Keith C. Sorensen, District Attorney, San Mateo County; James M. Cramer, District Attorney, San Bernardino County; Stanley M. Roden, District Attorney, Santa Barbara County; Louis P. Bergna, District Attorney, Santa Clara County; Christopher C. Cottle, District Attorney, Santa Cruz County;

In reviewing two judgments of the United States Court of Appeals for the Ninth Circuit[2] which enjoined application of certain California laws requiring that statements of weight on packaged food products sold to consumers be accurate and truthful, this Court is asked to decide whether certain federal laws[3] have displaced the power of the States to regulate weights and measures to prevent unfair competition and fraud in the marketplace.

The States' power to regulate weights and measures at the time and place of sale predates the Constitutional Convention of 1787 (*Turner v. Maryland*, 107 U.S. 38, 51-55 (1882)) and received explicit approval by this Court at least as early as 1898.

> "Where the subject is of wide importance to the community, the consequences of fraudulent

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Robert A. Rehberg, County Counsel, Shasta County; Robert W. Baker, District Attorney, Shasta County; Gene L. Tunney, District Attorney, Sonoma County; Donald N. Stahl, District Attorney, Stanislaus County; Edward F. Buckner, County Counsel, Sutter County; H. Ted Hansen, District Attorney, Sutter County; Henry J. Goff, Jr., District Attorney, Tehama County; Calvin E. Baldwin, County Counsel, Tulare County; J. W. Powell, District Attorney, Tulare County; Stephen Dietrich Jr., County Counsel, Tuolumne County; C. Stanley Trom, District Attorney, Ventura County; Bartley C. Williams, District Attorney, Yuba County; Burt Pines, City Attorney, Los Angeles, California.

[2]*The Rath Packing Company v. M. H. Becker, etc., et al.*, 530 F.2d 1295 and *General Mills Inc., et al. v. Jones*, 530 F.2d 1317.

[3]The federal laws in question are the Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended; 21 U.S.C. § 301 *et seq.*; the Fair Packing and Labeling Act, 80 Stat. 1296; 15 U.S.C. § 1451 *et seq.*; and the Wholesome Meat Act, 81 Stat. 584; 21 U.S.C. § 601 *et seq.* The decision in this case will also materially affect the Poultry Products Inspection Act, 71 Stat. 441 and the Wholesome Poultry Products Act, 82 Stat. 791, which together are set out at 21 U.S.C. § 451 *et seq.* as these Acts contain provisions substantially similar to those of the Wholesome Meat Act which are presented for review (compare, *e.g.*, 21 U.S.C. §§ 453(h)(5) and 467e with 21 U.S.C. §§ 601(n)(5) and 678, respectively.)

practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the State to intervene. *Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures,* the weighing of coal on public scales, and the like, are all competent exercises of that power. . . ." *Patapsco Guano Co. v. North Carolina,* 171 U.S. 345, 358 (1898). (Emphasis added.) *Accord Turner v. Maryland, supra* at 55.

Our power to prevent unfair competition and fraud and deception in the sale of food products at retail markets within our borders is equally well established. *E.g., Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148, 162 (1942); *Plumley v. Massachusetts,* 155 U.S. 461, 472 (1894).

In contrast with this clearly established reserved power of the States, there are presented the questions (1) whether one or more of the federal statutes in issue preempt California's nondiscriminatory regulation of local markets to assure fair competition and truth in packaging of food products, and (2) whether certain California laws are in irreconcilable conflict with federal laws which have been interpreted (amici contend this interpretation is erroneous) to permit sale to consumers and businesses of falsely labeled packaged food products.

The impact of this Court's decision will be significant indeed upon the justifiable expectations of businesses and consumers to receive full measure. Each day our

nation's wholesalers, retailers and consumers buy and sell millions of packages of food and other products.[4] They do so in reliance upon the accuracy of the quantity statements required by government to be placed on those packages. If, as the court below has held, those statements of quantity need no longer be truthful, then unfair competition by sale of short quantity will be encouraged (with purchasers required to pay billions of dollars more to obtain the same amount of product), purchasers will be cheated, commerce will be impeded by the necessity for large purchasers to determine exactly how much less than the stated quantity they are actually purchasing, and—as assuring truth in packaging is a long recognized function of government—our citizens' confidence in their government will be eroded.[5]

The impact of this Court's decision will be equally significant upon the power of the States to forbid false representations in the marketplace and to prevent the detrimental consequences thereof to both consumers and honest businesses.

As important as will be this Court's decision upon the power of the States to protect the welfare of our citizens and to assure them free and honestly

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[4]The total annual volume of commerce governed by weights and measures is in excess of $900 *billion.* Hearings Before House of Representatives Subcom. of Comm. on Appropriations; Depts. of State Justice, and Commerce, The Judiciary, and Related Agencies, Appropriation for 1975, 93d Cong., 2d Sess., Pt. 3, Commerce at 922.

[5]Examples of the egregious impact upon purchasers—consumers, retailers and other bulk purchasers (including government agencies)—of affirmance of the opinions of the circuit court are set out in Appendix A, *infra* at 1 *et seq.*

competitive markets, there is likely the additional impact resulting from the fact that both the Food, Drug and Cosmetic Act and Wholesome Meat Act apply with equal force to products which are "adulterated" as to products which are "misbranded." Thus, if the Court holds that the States cannot enact or enforce laws requiring truth in label statements of quantity (*i.e.*, forbidding "misbranding"), the Court's ruling could well have the effect of precluding the States from assuring the purity of foodstuffs sold to our consumers. Such a result would indeed represent a fundamental reversal of the powers of the States as provided for in our Constitution and as recognized by this Court.

Amici curiae, as States and their State Officers and Attorneys General charged with the enforcement of honest weights and measures laws and pure food and drug laws, are thus vitally concerned with the issues presented in this case.

Summary of Argument

The Food, Drug and Cosmetic Act (FDCA) does not preempt the States' traditional role in protecting our citizens from unwholesome, falsely labeled or deceptively packaged food products. The States may enact and enforce laws which require that products be wholesome (*e.g., Cloverleaf Butter v. Patterson*, 315 U.S. 148, 162 (1942)) and especially laws which require that products bear true statements of quantity of the contents when offered for sale (*see e.g., Patapsco Guano Co. v. North Carolina Bd. of Agric.*, 171 U.S. 345, 358 (1898)) so long as such laws do not irreconcilably conflict with the FDCA, which itself requires that consumers receive full quantity and wholesome products. (*Infra* at 15-26.)

The federal Fair Packaging and Labeling Act of 1966 (FPLA) expressly requires true weight to the consumer. 15 U.S.C. §§ 1451, 1453(a). The FPLA preempts only less stringent State label *format* laws, it does not preempt State laws governing the *accuracy* of label statements at retail. Nor does it affect the States' power to enforce our laws, which are more stringent than FPLA requirements and which require true weight to purchasers. (*Infra* at 26-32.)

The Wholesome Meat Act (WMA) contains statutory provisions substantially similar to those of the FDCA, with the exception of section 408 which expressly recognizes the States' *concurrent jurisdiction* to enforce adulteration and misbranding requirements, which are *consistent with* those of the WMA. (*Infra* at 53-55, 58-61.)

WMA section 408 also, *arguendo*, preempts State labeling requirements which differ from federal requirements, but labeling is properly defined as concerning *format* (type size, location, etc.) and not *accuracy*, which is included within the WMA's *misbranding* definition. Thus, the WMA confirms the concurrent jurisdiction of the States to require full measure at retail. This interpretation carries out the Congressional intent to have uniform product labels *and* true weight to the consumer, *and* at the same time recognizes the States' historic role in preventing deception in the marketplace. (*Infra* at 56-58.)

The California weight standard is identical to the federal—true weight to the consumer. The accuracy-on-the-average procedure which petitioner Jones uses is merely a practical means of enforcing compliance with the statutory standard. The circuit court erroneously rejected Jones' use of California's statistically valid en-

forcement procedure. Literally billions of packages are sold upon the basis of their weight. To properly carry out their duties, weights and measures officials must be able to utilize a statistically valid weight testing procedure which enables them to accurately determine the weight of large lots of packages by testing much smaller samples. The circuit court's injunction against Jones' use of a procedure which the district court found to be statistically valid precludes use of such a sensible enforcement tool. Similarly, the lower court's command that a valid enforcement procedure must require that *over*weight packages as well as those which are underweight shall be ordered off sale will result in a senseless misallocation of enforcement officials' time. No useful purpose is served by requiring enforcement action against overweight packages even though they may be technically out of compliance. (*Infra* at 32-42.)

Jones' use of California's accuracy-on-the-average testing procedure is in accord with principles promulgated by the National Bureau of Standards (NBS) for use by the States pursuant to Congressional directive. The Environmental Protection Agency (EPA) utilizes a similar accuracy-on-the-average procedure to assure compliance with a statutory standard of accurate weight. (*Infra* at 34-37.)

To interpret the FDCA, FPLA and WMA to permit shortages in products at retail while, under an identical statutory command, EPA requires true weight to the consumer would both create and sanction an egregious

anomaly: *it would compel accuracy in packaged poisons but permit shortages in food (and other) products.* (*Infra* at 19-20.)

To affirm the circuit court's ruling would cause serious harm to consumers, create a severe problem of unfair competition and place substantial impediments upon *effective* enforcement of truth in packaging laws. Consumers, including business purchasers, presently rely upon receiving full measure and value for their purchasing dollar. To lower this standard of accuracy to the "reasonable shortages" nonstandard of the circuit court would allow deliberate shortages and result in purchasers getting less than the amount stated. This would increase costs due to the need to pay more to get that which was originally bargained for, resulting in increased costs to distributors who must pass these costs on to individual consumers.

$900 *billion* of commodities are sold upon the basis of weight or measure, a substantial portion of which are packaged products. *Even a one percent decrease in the weight of products at retail could result in an increased cost to the public of billions of dollars.* Thus, the circuit court's sanction of "reasonable" shortages at retail will, if affirmed, have a tremendous inflationary impact. Further, the unfair competitive advantage reaped by one business trying to take advantage of the circuit court's "reasonable shortages" nonstandard would compel his competitors to follow, to the detriment of the public. *Thus this case is about billions of extra dollars which purchasers of food and other products*

would be forced to pay if a standard, other than the longstanding one of full measure to the purchaser, is now imposed. (*Infra* at 43-47.)

Amici urge this Court to confirm the States' power to prevent the fraud and deception which necessarily results from the passing-off of short-measure food (and other) products for full-measure. To force us to lower our standard of accuracy and full measure to the circuit court's nonstandard of short weight would deny us our sovereign police power in an area of vital State concern and importance. (*Infra* at 64-68.)

ARGUMENT

I

CALIFORNIA LAWS WHICH ASSURE TRUE WEIGHT TO THE PURCHASER ARE NOT IN CONFLICT WITH FEDERAL LAWS

A. The Opinions of the Circuit Court

This case presents for review two judgments of the United States Court of Appeals for the Ninth Circuit. In *General Mills, Inc., et al. v. Jones,* 530 F.2d 1317 (1975) (hereinafter *General Mills*), the Ninth Circuit held that (1) California Business and Professions Code section 12211 (hereinafter section 12211) and Title 4 California Administrative Code, chapter 8, subchapter 2, Article 5 (hereinafter Article 5) impermissibly conflict with the standards imposed by the federal Food, Drug and Cosmetic Act (hereinafter FDCA) and by the Fair Packaging and Labeling Act (hereinafter FPLA); and (2) California Business and Professions Code section 12607 (hereinafter section 12607) as implemented by Title 4 California Administrative Code, chapter 8, subchapter 2.1 (hereinafter subchapter 2.1)[6] is also in irreconcilable conflict with FDCA and FPLA standards. 530 F.2d at 1328. The question presented in *General Mills* is thus "whether California's [enforcement] scheme impermissibly *conflicts* with federal law . . . an inquiry different from that where express preemption is involved. *Cf. Campbell v. Hussey,* 368 U.S. 296, 300 (1961)." 530 F.2d at 1325 (emphasis in original). The Ninth Circuit's holding is arguably in conflict with that of the Second Circuit in *General*

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[6]Subchapter 2.1 was promulgated with the intent of complying with the district court's order pending appeal. *See* nn. 27 and 33, *infra.*

Mills, Inc. v. Furness, 398 F.Supp. 151 (S.D.N.Y. 1974) *aff'd,* 508 F.2d 836 (1975). *See infra* at 41-42.

In *The Rath Packing Company v. M. H. Becker, etc., et al.,* 530 F.2d 1295 (1975) (hereinafter *Rath*) the Ninth Circuit held that (1) section 12211 and Article 5 were preempted by section 408 (21 U.S.C. section 678) of the federal Wholesome Meat Act (hereinafter WMA); and (2) section 12607 as implemented by Title 4 California Administrative Code, chapter 8, subchapter 2, Article 5.1 (hereinafter Article 5.1)[7] were similarly preempted by the WMA. 530 F.2d at 1317. Thus the question presented in *Rath* is whether the WMA *preempts* the questioned California laws.[8] This question is not resolved by the Sixth Circuit's ruling in *Armour & Co. v. Ball,* 468 F.2d 76 (1972). *See infra* at 59.

The question of the effect of the FPLA and WMA upon State laws has never been before this Court for plenary hearing; nor has the effect of the 1966 enactment of the FPLA upon the FDCA been presented for review.

To permit a logical presentation of the complex issues in this case and to permit discussion of these issues in the historical perspective of the sequence

[7]Article 5.1 (identical to subchapter 2.1) was also promulgated with the intent of complying with the district court's order pending appeal.

[8]Rath has never contended that the California laws were an unreasonable burden on interstate commerce. (Complaint, *passim.*) The contention of *General Mills Inc., et al.* (complaint, *passim*) that the California laws in issue unreasonably burdened interstate commerce was held to be without merit by the circuit court (530 F.2d at 1322). As General Mills has not sought review of that holding, no question of its validity now may be raised. *See Michelin Tire Corp. v. Wages,* ..... U.S. .... (1976), 96 S.Ct. 535, 538 n. 2; *cf. Irvine v. California,* 347 U.S. 128, 129 (1954).

of enactment of the federal legislation, amici will discuss first the issues presented in *General Mills*—the FDCA, next the FPLA and the effect of its enactment upon the FDCA, and finally the combined impact of the FDCA and FPLA upon State laws (Section B); we will then discuss the issues presented in *Rath*—the WMA and its impact upon State laws (Section C).

B. There Is No Irreconcilable Conflict Between the FDCA, FPLA and California's Truth in Packaging Laws

i. Introduction

In *General Mills* the circuit court held that compliance with the FDCA excused compliance with the more stringent requirements of the FPLA and that the California regulatory plan would be valid only (1) if it imposed a standard *not different than* that set by the FDCA or (2) if it imposed a standard *not less stringent than* that required by the FPLA. The circuit court found the California standard to be both *different than* that required by the FDCA and *less stringent than* that required by the FPLA. 530 F.2d at 1326-27.

Amici contend that products subject to regulation by both the FDCA and FPLA must meet the stricter FPLA standard, that the California standard as implemented through its statistically valid enforcement procedure is not in conflict with the federal standard and that federal law does not preclude supplementary State regulation of products at retail.

ii. The FDCA Requires Full Measure at Retail

Section 301 of the FDCA, 21 U.S.C. section 331, prohibits the introduction or receipt in interstate

commerce of food that is adulterated or misbranded as well as the adulteration or misbranding of a food which is held for sale (whether or not the first sale) after shipment in interstate commerce.[9]

Section 403(e) of the FDCA, 21 U.S.C. section 343(e), declares that a food is misbranded if it is in package form and does not bear a label containing an *accurate* statement of the quantity of contents.[10]

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[9]21 U.S.C. section 331 provides:

The following acts and the causing thereof are prohibited:

"(a) The introduction . . . into interstate commerce of any food . . . that is adulterated or misbranded.

"(b) The adulteration or misbranding of any food . . . in interstate commerce.

"(c) The receipt in interstate commerce of any food . . . that is adulterated or misbranded.

". . . .

"(k) The adulteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to a food . . . if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

". . . ."

[10]21 U.S.C. section 343, provides:

A food shall be deemed to be misbranded—

". . . .

"(e) If in package form unless it bears a label containing . . . (2) an accurate statement of the quantity of the contents in terms of weight. . . .: *Provided,* That . . . reasonable variations shall be permitted . . . by regulations prescribed by the Secretary."

This definition is effectively unchanged from that which has been a part of the FDCA and its predecessor statute, the Pure Food and Drug Act of 1906, 34 Stat. 768.

As enacted in 1906, the Pure Food and Drug Act defined a misbranded food as:

"Third. If in package form, the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package." 34 Stat. 771.

In 1913 the Congress amended this section to read:

"Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight . . .: *Provided, however,* That reasonable variations shall be permitted [by regulations]." 37 Stat. 732. Addition of this proviso permitting reasonable

The statute contains a provision authorizing "reasonable variations" from the statutory command of strict accuracy[11] and the Food and Drug Administration (FDA) has had in force during the pendency of this lawsuit a regulation which requires that net quantity declarations shall be accurate, but which permits those "reasonable variations" which result from two specific causes in manufacture or distribution.[12]

Notwithstanding statutory mention of "reasonable variations," this Court has held that the proviso, now contained in section 403(e), is not a part of the definition of the offense, and thus the substantive requirement is that the quantity of contents shall be accurately stated. *United States v. Shreveport Grain & El. Co.,* 287 U.S. 77, 82 (1932). This is also the position taken by the United States as amicus curiae in the Ninth Circuit in the present case.[13] Thus the Government urged: "[Under the statute] [t]here is no exception for variations, even if reasonable or unavoidable . . . [However] the proviso and regulations operate to miti-

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variations did not vary the definition of the offense of misbranding. *United States v. Shreveport Grain & El. Co.,* 287 U.S. 77, 82 (1932), which is discussed in the text *infra* at 17.

[11]*See* n. 10, *supra.*

[12]The FDA regulation, 21 CFR 1.8b(q) provides:

"The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."

[13]*General Mills v. Jones,* brief of the United States as Amicus Curiae, page 7 (set out in Appendix to Brief in Opposition to Petition for Certiorari in Nos. 75-1052 and 75-1053, 6 at 13; hereinafter cited, using the pagination of the Appendix to the Brief in Opposition, as Brief of the United States at .....). *See also* Appendix to Brief of the United States at 11.

gate this hard-and-fast rule. The mitigation takes place *not by modifying the requirement for accurate labeling*, but by *exempting from enforcement* those violations which the Secretary [of Health, Education and Welfare] deems to be reasonable *violations*." Brief of the United States at 13. (Emphasis added.)

Thus the FDCA standard is that a packaged food product is in violation of the law unless its label bears a true statement of net quantity whenever inspected; however, FDA may refrain from taking enforcement action when, in the exercise of its prosecutorial discretion, the agency deems a violation to be "reasonable."[14]

When does the FDCA accuracy standard apply? While it would be technically correct to conclude that the net quantity statements on all products subject to this Act must be correct at all points in the chain of distribution, there are some products (*e.g.*, General Mills' flour) which are not packed in leakproof materials and thus for which weight can vary slightly due to leakage or large fluctuations in humidity.[15]

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[14]Notwithstanding *Shreveport* and the announced position of the Government in accord therewith, the court below held that the proviso and the regulation did operate to change the statutory standard: "We hold 21 C.F.R. 1.8b(q) is valid and forms part of the federal labeling standard under the FDCA." 530 F.2d at 1324.

Even if this Court should overrule *Shreveport* and hold that the regulation does modify the statutory standard, amici show (*infra* at 38-40 and at n. 64) that State laws (including California's) are not in conflict with the resulting federal standard.

[15]Most differences in humidity have no significant effect upon the weight of products packed in porous materials. *See* Affidavit of James Robey, *e.g.*, at 2, line 29-3, line 2; Appendix B *infra* at 6 (¶9(b) and (d)) [Cl. Tr. at 306-07] in which he reports upon a survey which revealed that humidity variances between California's arid desert and moist seaside areas produced no significant change in the weight of respondents' packaged flour products.

Thus resolution of this question requires an inquiry into the purpose of the FDCA—the proper answer to the question is given by a determination of what class the statute is intended to protect—consumers and honest competitors using modern procedures, or packers resistant to change and relying upon outmoded practices and who contend they need not give honest weight in any package anywhere in the Nation.

This Court has consistently held that the purpose of the FDCA is to protect and safeguard the ultimate consumer. *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 92 (1964); *Accord United States v. Dotterweich*, 320 U.S. 277, 280 (1943) ("The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection.") quoted in *United States v. Park*, 421 U.S. 658, 668 (1975). The FDCA requires those who distribute food to be "the strictest censors of their merchandise," *id.* at 671, quoting *Smith v. California*, 361 U.S. 147, 152 (1959).

Thus the critical point for determining whether a weight statement on a non-leak-proof package is accurate is at the time of sale to the consumer; determination solely at the time of packaging would defeat the basic purpose of the statute—protection of purchasers, both businesses and consumers.

Administrative interpretation of an analogous statutory scheme fully supports this conclusion. Thus the Federal Insecticide, Fungicide & Rodenticide Act, 61 Stat. 163, as amended, 7 U.S.C. § 135(a), prohibits distribution in commerce of poisons unless their packages bear a true statement of weight, subject to the proviso that reasonable variations may be provided. This statu-

tory command is implemented by the regulation of the Environmental Protection Agency (EPA) to require full measure *to the purchaser*. Thus 40 CFR section 162.104 provides:[16]

> "(e) *Allowance for loss.* A statement of net content 'when packed' does not comply with the requirements of the act. The statement must be such that it will be correct as long as the economic poison is subject to the law. Thus, *if a product such as borax may lose weight by drying out when stored in paper bags, it must be packed and labeled in such a way that the statement of net content will be correct when the product is purchased.*"[17] (Emphasis added.)

Thus EPA requires that commodities so packaged as to be subject to moisture loss be either packaged or filled so that the statement of net contents will be correct when the product is purchased.

It would be anomalous indeed to conclude that, while EPA requires that purchasers of poisons get

[16]The text of the Federal Insecticide, Fungicide and Rodenticide Act and its weight regulation are set out in Appendix C, *infra* at 9-10.

[17]Handbook 67, the model package weight inspection procedure promulgated by the Secretary of Commerce, National Bureau of Standards for use by the States, also requires accurate weight on the average to consumers and acknowledges "that packers must be allowed to overfill such packages as are susceptible of moisture loss." *Id.* at 8 (Handbook 67 is reprinted in its entirety in the appendix to amici's Brief in Support of Jones' Petition for Certiorari (gray cover); *see* pp. 5 and 15 thereof).

true weight, under the FDCA purchasers of food may get short weight.[18]

iii. The FDCA Does Not Preempt "Different" State Laws

The circuit court held that "by virtue of the 'savings provisions' of 15 U.S.C. § 1460, compliance with the FDCA is to be considered compliance with the FPLA. By the same token, any state net weight labeling standard which is *not different* from the standard set forth in 21 U.S.C. § 343(e) and 21 CFR 1.8b(q) cannot be considered 'less stringent' than the FPLA standard." 530 F.2d at 1325-26. (Emphasis in original.)

Amici discuss *infra* at 28-29 the proper construction of 15 U.S.C. section 1460, concluding that compliance with the more stringent FPLA standards is required.

[18]Regrettably both the court below and the Government in its amicus curiae brief in the Ninth Circuit have concluded that short measure should be permitted in food (and other) products. They reach this conclusion by radically different reasoning. The circuit court, having concluded that the Food and Drug Administration (FDA) regulation is part of the statutory offense (530 F.2d at 1324), mistakenly interprets that regulation to permit *every package* to be short weight when offered for retail sale. 530 F.2d at 1327, *i.e.*, shortages to all of the people all of the time. The Government, however, concluded that the FDA regulation is no part of the statutory offense (*accord United States v. Shreveport Grain & El. Co., supra*, 287 U.S. 77, 82 (1932)), but views shortages at retail as required to protect consumers from *overweight* packages (Brief of the United States at 19) and as necessary because the use of proper packaging material imposes a burden on *packers* (*id.*, at 20).

Amici contend that *proper* consideration for the Congressional purpose of the FDCA requires that purchasers' interests be given greater weight than those of the packers and that FDA's discretion to excuse violations should be exercised to facilitate full net quantity and accurate statement of net weight to the *consumer or business purchaser, i.e.*, to permit (or require) packaging so that *food* products, as are *poisons*, are true weight when purchased.

What concerns us at this point is the lower court's conclusion that compliance with the FDCA may only be achieved by a state net weight "labeling" standard which is *not different from* the FDCA standard. The circuit court's holding is premised upon an erroneous interpretation of the term "labeling" and is in conflict with prior decisions of this Court validating the power of the States to enact laws differing from the FDCA in our regulation of the sale of foodstuffs to protect our citizens—consumers and businesses—from fraud and deception, and from unfair competition.

First, the lower court overlooks an important distinction between the *format* of a label (type, size, placement of information, etc.) and the *accuracy* of that information. It is clear from the FDCA's definition of the terms label and labeling[19] on the one hand and the term misbranding[20] on the other, that the

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[19]21 U.S.C. section 321(k) provides:

> The term "label" means a display of written, printed, or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

21 U.S.C. § 321(m) provides:

> The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

[20]21 U.S.C. § 343 provides:

> A food shall be deemed to be misbranded—
> (a) If its labeling is false or misleading in any particular.
> (b) If it is offered for sale under the name of another food.
>
> See also §§ (c)-(g).

former are concerned with matters related to *format* while the latter relates to assuring that what is stated is *accurate.* Any remaining question on this point is fully resolved by a reading of section 343(n) which clearly distinguishes between the format of what is printed on the label and the *accuracy* of that information.[21]

Second, there is no basis for a conclusion that the FDCA precludes State laws which are merely different from the FDCA.

The subject matter addressed by the FDCA—the readying of foodstuffs for market—is a matter of peculiarly local concern. *E.g., Florida Lime & Avocado Growers, Inc., et al. v. Paul,* 373 U.S. 132, 144 (1963).

The FDCA contains no expressly preemptive language and there is no legislative history which indicates an intent to preclude State regulation. To the contrary, as the circuit court acknowledges, "The legislative history of the FDCA shows a regard in the Congress for the exercise of State police power" (530 F.2d at 1325) and the 1938 amendments do not indicate any change in the intent of Congress that the FDCA *does not "interfere in any way with the power of the State officials over local trade* but the purpose of the bill is to give to State officials the aid of

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[21]21 U.S.C. section 331(n) provides:

> (n) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual.

the National Government and to receive from the State officials their aid in the enforcement of the national law." H.R. Rep. No. 2118, 59th Cong., 1st Sess., March 7, 1906, quoted at 530 F.2d at 1325. (Emphasis added.)

Indeed the States are free to enact and enforce standards more stringent than those required under the FDCA so long as there results no frustration of the Congressional purpose. Thus, in *Corn Products Refg. Co. v. Eddy*, 249 U.S. 427 (1919), this Court confirmed the power of the States to impose additional requirements upon products subject to the FDCA's predecessor, the Food and Drug Act, validating a Kansas law which required disclosure upon the package labels of syrups of the percentage of each ingredient (*id.* at 431) and thus disclosure of the manufacturer's trade formula notwithstanding the fact that the federal law expressly excepted such "trade secrets" from disclosure. *Id.* at 438-39. And in *Hebe Co. v. Shaw*, 248 U.S. 297 (1919), this Court upheld an Ohio law which, to prevent the passing off of a lesser quality product for pure condensed milk, forbade the sale of a milk compound. In so holding the Court rejected a claim (*see id.* at 298-99) that the State law offended the Pure Food and Drug Act, saying through Mr. Justice Holmes, "The Food and Drugs Act . . . does not prevent state regulation of domestic retail sales [citations omitted]." *Id.* at 304.

Replacement in 1938 of the Pure Food and Drug Act by the FDCA has not changed this Court's view of the role of the States. Thus in 1942, in *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, this Court confirmed the power of a State (at least in the absence of an express contrary command of Congress) to confis-

cate or exclude from its markets processed butter which had complied with all the federal processing standards if that food failed to meet the *higher* standards demanded by a State for its consumers. Indeed the Court stated that such a higher standard "is permissible under all the authorities." *Id.* at 162. *See also Florida Lime & Avocado Growers Inc., et al. v. Paul, supra,* 373 U.S. 132, 144-45 (1963).[22]

And earlier in this term (1975), this Court again noted the authority of a State to require that a food which had traveled in interstate commerce must meet the State's own standards. *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell,* ..... U.S. ....., 96 S.Ct. 923, 930-31 (1976), citing *Dean Milk Co. v. Madison,* 340 U.S. 349, 355 (1951).

It is therefore clear beyond question that unless the State laws in issue objectively and seriously frustrate the achievement of the Congressional purpose underlying the federal legislation they must be upheld, notwithstanding any additional regulation which they may impose upon food products subject to both federal and state laws.

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[22]Even prior to enactment of the Pure Food and Drug Act in 1906, this Court said:

"In the execution of its police powers we admit the right of the State to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the State." *Schollenberger v. Pennsylvania,* 171 U.S. 1, 14 (1898).

As the authorities cited in the text demonstrate, enactment of the Pure Food and Drug Act and the FDCA has not substantially altered this necessary power of the States.

For the circuit court to conclude that the FDCA precludes the States from imposing more stringent requirements was clearly error.

iv. Products Subject to Both the FDCA and FPLA Must Meet the Higher Standards of the FPLA

In 1966 the Congress enacted the FPLA, 80 Stat. 1296, 15 U.S.C. section 1451 *et seq.*, and in so doing made this declaration of congressional policy: "*Informed* consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable *consumers* to obtain *accurate* information as to the quantity of contents and should facilitate value comparisons. . . ." *Id.* § 2. (Emphasis added.)

The FPLA forbids the distribution in commerce of any packaged consumer commodity unless in conformity with regulations

". . . which shall provide that—

(2) The net quantity of contents . . . shall be separately and *accurately* stated in a uniform location upon the principal display panel of that label. . . ." *Id.* § 4, 15 U.S.C. § 1453. (Emphasis added.)

This section also prescribes that certain other information shall be contained upon package labels.[23]

[23]The information required to be placed upon labels of packages subject to the requirements of the Act include the *terms* in which statements of weights shall be expressed (pounds and fractions thereof), the *manner* in which the statement of weights shall appear ("conspicuously and in easily legible type in distinct contrast . . . with other matter on the package"), the *size* of letters and numerals and the *placement* of all such writing. *Id.* § 4, 15 U.S.C. § 1453.

This section also expressly forbids appearance of any words or phrases which qualify a unit of weight or tend to exaggerate the amount of the commodity contained in the package.

The Circuit Court concluded that the FPLA set a standard of "strict accuracy." 530 F.2d at 1326 n.4, 1327. Amici concur in *that* holding, as it is the only conclusion consistent with the language of section 1453(a) (an *accurate* statement of weight) and with the congressional purpose of this legislation—to enable *consumers* to obtain *accurate* information as to the quantity of contents.[24]

The FPLA also provides that any consumer commodity which is a food, drug, device or cosmetic, as each of these terms is defined by the FDCA and which is *in violation of the FPLA*, "shall be deemed to be misbranded within the meaning of [the FDCA]." *Id.* § 7, 15 U.S.C. § 1456(a). (Emphasis added.)

[24]It should be noted that the FPLA does not allow the adoption of regulations permitting "reasonable variations." In contrast to the express delegation of authority to prescribe such variations given in the FDCA (21 U.S.C. § 343(e)) (which variations nevertheless do not vary the statutory offense, *United States v. Shreveport Grain & El. Co., supra,* 287 U.S. 77, 82 (1932)), in enacting the FPLA the Congress specifically prescribed that regulations adopted under the authority of the FPLA shall require that the net quantity of contents shall be "*accurately* stated." 15 U.S.C. § 1453(a)(2).

This prohibition of regulations permitting "reasonable variations" may be viewed as confirmation of the intent of Congress that accurate weight to the consumer is a vital part of the FPLA (*accord* FPLA § 2, 15 U.S.C. § 1451) and as Congressional recognition of this Court's holding in *Shreveport, supra,* that the reasonable variations proviso does not alter the definition of the offense of misbranding. FPLA § 5, 15 U.S.C. section 1454, which makes reference to regulations to be adopted under the FPLA, does not grant authority to permit "reasonable variations." While a regulation allowing "reasonable variations" would be permissible under the authority granted to FDA by the *FDCA*, products subject to both the FDCA and FPLA must nevertheless meet the *stricter and later enacted FPLA* requirement of strict accuracy. FPLA § 7, 15 U.S.C. § 1456(a) (discussed in the text, *infra*). (Thus, FDA's adoption of 21 CFR 1.8b(q) upon the asserted authority of the FPLA (32 Fed. Reg. 10729, col. 3, July 21, 1967) was erroneous.)

Thus the scope of the FPLA overlaps that of the FDCA, prescribing specific requirements for information which is to be disclosed on labels of food products which are consumer commodites[25] (as are the products in the present case) and makes an act proscribed by the FPLA a violation of the FDCA.

The Circuit Court held that "by virtue of the 'savings provisions' of 15 U.S.C. § 1460, compliance with the FDCA is to be considered compliance with the FPLA." 530 F.2d at 1325. Thus the court below concluded that compliance with the FDCA *excuses* compliance with the more stringent and specific FPLA requirements. Amici contend this holding is error.

FPLA § 11, 15 U.S.C. § 1460, provides:

> "Nothing contained in this Act shall be construed to repeal, invalidate, or supersede—
>
> ". . . .
>
> "(b) the Federal Food, Drug, and Cosmetic Act. . . ."

While that statement can fairly be taken to mean that the FDCA is not superseded by the FPLA, it cannot be construed to excuse compliance with FPLA tandards where both FDCA and FPLA requirements are applicable.

This result is compelled by (1) section 1456(a) which, as noted above, specifically makes a violation of the FPLA, violation of the FDCA, (2) the definition of consumer commodity to expressly include "any food, drug, device, or cosmetic (as those terms are defined by the Federal Food, Drug, and Cosmetic Act)" (FPLA

[25]The term consumer commodity is defined in section 10 of the FPLA, 15 U.S.C. section 1459(a).

§ 10, 15 U.S.C. § 1459(a)), (3) the contrasting *exemption* from coverage by the FPLA of meat and poultry and certain other items (*id.* 15 U.S.C. § 1459 (a)(1)-(5)), and (4) the Congressional statement that the purpose of the FPLA is to provide *maximum* protection to consumers. (*Id.* § 2, 15 U.S.C. § 1451.)

Thus, while a food product misbranded under FDCA standards is subject to action pursuant to that law, the same food product is subject to action if it violates the more stringent FPLA standard.[26]

v. The FPLA Does Not Preempt State Laws Requiring That Package Weight Be Accurate When Sold to Consumers

Amici have set forth *supra* at 15-20 and 26-29 the reasons why the FPLA must be considered to require accurate weight to the consumer.

Assuming *arguendo* that the FPLA does not by its own terms require true net quantity to the consumer, the Act nevertheless expressly permits enforcement of State laws which are not less stringent than the federal law.

Thus, FPLA section 12, 15 U.S.C. section 1461 provides:

> "It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof inso-

[26]The legislative history of the FPLA does not elucidate the Congressional intent concerning section 11, 15 U.S.C. section 1460. Neither the Senate Report (No. 1186, 89th Cong., 2d Session) nor the Conference Report (No. 2286) even refer to section 11. 3 1966 U.S. Code Cong. & Admin. News 4069. The sole reference to section 11 is contained in the message of the President of the United States transmitting this and other proposed legislation. Referring to section 11, the President stated only "There are no changes in existing law" and proceeded to note the text of § 11. *Id.* at 4086.

far as they may now or hereafter provide for the *labeling of* the net quantity of contents of the package of any consumer commodity covered by this chapter which are *less stringent than or require information different from* the requirements of section 4 of this Act, [section 1453 of Title 15] or regulations promulgated pursuant thereto." (Emphasis added.)

The lower court interprets this language to expressly permit State laws which impose a standard which is not less stringent than that of the FPLA. (530 F.2d at 1324-25.)[27] Thus California and her sister States are free to enact and enforce laws requiring true weight to consumers and businesses even if federal laws do not impose the same standard.[28]

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[27]Although the circuit court says that State laws not less stringent than the FPLA are not necessarily preempted (*e.g.*, 530 F.2d at 1325), in applying this test the court below interprets section 12 so that there is *in fact* preemption of *all* State laws which are *different than* the FPLA standard. Further, although the lower court states that the FPLA requires strict accuracy (*id.* at 1326), it *interprets* the standard to require "reasonable" shortages.

Thus in discussing subchapter 2.1, the California regulation (now superseded) which was meant to apply pending resolution of this controversy and which required true weight in each package—a standard not less stringent than the FPLA standard announced by the circuit court, the lower court states ". . . simultaneous compliance with federal law and [the California regulation] is made physically impossible by California's failure to recognize reasonable variations from label weight as permitted by 21 CFR 1.8b(q). *Id.* at 1328.

The circuit court is inaccurate as well as inconsistent. Its *construction* of section 12 simply ignores the not "less stringent than" language of the statute—language which clearly permits enforcement by means such as subchapter 2.1.

[28]The legislative history of the FPLA supports this conclusion. Senate Report No. 1186 (89th Cong., 2d Sess.) states:

> Section 12 provides that regulations promulgated under the act shall supersede State law only to the extent that the States impose net quantity of contents labeling requirements which differ from requirements imposed under the terms of the act. *The bill is not intended to limit the authority of the States to establish such packaging and labeling standards as they deem necessary in response to State and local needs.* (Emphasis added.)

This is not to say that the Congress was not justifiably concerned with *accuracy* of package weight representations, but only that any preemption was expressly limited to labeling *format* and does not extend to *accuracy*.

Accuracy is covered by a different section of the FPLA, section 4, 15 U.S.C. § 1453, which contains no preemptive language. *Cf. Atlantic Ocean Products, Inc. v. Leth,* 292 F.Supp. 615 (D. Ore. 1968) *aff'd.* 393 U.S. 127 (1968), in which the court held that § 1461 did not preclude the State of Oregon from regulating the accuracy of product names even though the descriptive name used was part of the package label.

Moreover, even assuming *arguendo* that section 12 precludes the States from imposing label *format* requirements which differ from those of FPLA, it does not preempt State laws requiring that those labels be *accurate*.

In this regard we consider first the definition of the term "label".

FPLA section 10, 15 U.S.C. section 1459(c) provides:

> "The term 'label' means any written, printed, or graphic matter affixed to any consumer commodity or affixed to or appearing upon a package containing any consumer commodity."

That label *format* is distinct from the *accuracy* of "graphic matter" is seen by the separately stated requirement of FPLA's section 4, 15 U.S.C. section 1453(a)(2), prescribing that such graphic matter must be *accurate*.

Second, the legislative history of the FPLA, Senate Report No. 1186 (89th Cong., 2d Session) lists the specific practices which were sought to be remedied.

Each of these practices (*e.g., inconspicuous* net quantity statements)[29] is concerned with label *form* and *not accuracy*. Nowhere in the legislative history of enactment of the FPLA is there any criticism of state enforcement of net quantity *accuracy requirements*, much less any suggestion that the FPLA was intended to debase the preexisting standard of accuracy at time of sale—the statutory language and legislative history are both to the contrary.

Third, the policy basis for the FPLA is the protection of consumers and providing them with *accurate* information as to quantity of contents. 15 U.S.C. § 1451. There is no conflict between this policy of assuring *accuracy* at time of purchase and that requiring uniform national label *format* standards.

Thus while the States, *arguendo*, may be restrained from imposing requirements as to type, size or color or as to other aspects of label *format*, FPLA section 12 does not preclude us from requiring that what is set out on those labels is *accurate* when the product is sold to our consumers and businesses.

vi. The California Laws in Issue Do Not Impermissibly Conflict With Federal Law

Amici have established, *supra*, that federal law requires true net quantity to the consumer and business purchaser. We now establish that the relevant California statutes and regulations achieve this same standard and do so by means of a practical, statistically valid enforcement procedure; thus the California laws are not in conflict with their federal counterparts.

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[29]The listing of practices sought to be remedied is reprinted in Appendix C, *infra* at 11-12.

(a) *California Law Requires True Weight to the Consumer*

California Business and Professions Code section 12024 sets the standard for sales of all goods in California. It provides:

> "Every person, who by himself, or through or for another, sells any commodity in less quantity than he represents it to be is guilty of a misdemeanor."

This standard is restated in the California Fair Package and Labeling Act (CFPLA), Calif. Bus. and Prof. Code section 12600, *et seq*. Thus, Calif. Bus. and Prof. Code section 12603(b) forbids distribution of packaged consumer commodities which do not contain *accurate* weight statements.[30]

Thus the California standard is identical to federal law. 15 U.S.C. § 1453(a)(2); 21 U.S.C. § 343(e); *cf. United States v. Shreveport Grain & El. Co., supra*, 287 U.S. 77, 82 (1932).

Also involved in this case is the enforcement procedure used by California. Proper evaluation of that procedure depends upon understanding its background and purpose, subjects now discussed.

Literally billions of packages of consumer commodities are sold every year, each containing upon its label a representation of the quantity of net contents. The responsibility placed upon State and local weights and measures officials to assure purchasers of the

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[30]The CFPLA is patterned after the FPLA, expressing the same purpose—protecting purchasers against deception and providing consumers accurate information as to quantity of contents. Compare Calif. Bus. & Prof. Code §§ 12601-12605 with 15 U.S.C. §§ 1451-1453.

accuracy of such label weight statements (and of other label representations) is equally immense. It is simply not possible for even the comparatively large staff of trained and equipped State and local weights and measures inspectors to inspect each package offered for sale.

Recognizing both the enormity of the problem of how to verify package weight statements for hundreds of thousands of different products and the need for a solution which is at the same time fair to the packer and the purchaser, in 1959 the United States Department of Commerce, National Bureau of Standards (NBS) published a handbook for checking Prepackaged Commodities by State officials. (Handbook 67.)[31]

Handbook 67 is based upon a well recognized, valid statistical law—that the weight of a group (lot) of homogeneous product can be accurately determined by inspection of a portion (sample) of the packages which comprise the lot.

As promulgated by NBS, the application of this fundamental law of statistics has three key elements: (1) individual packages are permitted reasonable varia-

[31]Handbook 67 is published under the Congressional grant of authority to the Secretary of Commerce (64 Stat. 371, 15 U.S.C. § 272(5)) to cooperate "with the States in securing uniformity in weights and measures laws and methods of inspection."

It should not be overlooked that the Congress has continued to fund NBS activities—including a proposed revision of Handbook 67 (which carries forward the principles discussed in this brief)—in part in express recognition of the fact that "In the United States, regulatory authority for the enforcement of weights and measures laws and regulations rests with State and local jurisdictions." Hearings on Departments of State, Justice and Commerce, The Judiciary and Related Agencies Appropriation for 1976, House Committee on Appropriations, 94th Cong. 1st Sess., pt. 4 at 572-73. *Id.* for 1975, pt. 3 at 922-23.

tions (both plus and minus), (2) the lot is considered to meet the statutory standard so long as its *average net quantity is at least* the amount stated upon the packages, and (3) *packagers are permitted to overpack to compensate* for variations in weight due to loss of moisture. Handbook 67 specifically authorizes net quantity to be determined on an average basis, requires packers to overfill such commodities as are susceptible of moisture loss, and recommends legal action only when the average weight of the lot is less than the standard required.

Similar statistical procedures utilizing this accuracy-on-the-average principle are used by federal agencies to determine compliance with statutory standards calling for absolute accuracy in each item. For example, as discussed, *supra* at 19-21, EPA has interpreted a statute (7 U.S.C. § 135(a)) which requires that label statements of weight be accurate, subject to regulations which permit reasonable variations, to require accurate-weight-on-the-average. 40 CFR § 162.104. (Appx. C, *infra*, at 9-10.) EPA's regulation is based upon a similar USDA interpretation. (Interpretation No. 6 of the Regulations for the Enforcement of the Federal Insecticide, Fungicide and Rodenticide Act, February, 1965.)

Further the EPA regulation and Handbook 67 require that commodities subject to moisture loss be packaged so that the statement of net contents will be correct when the product *is purchased*. 40 CFR section 162.104 (e); Handbook 67, p. 8, § 8, Step 3; set out in Appendix to Brief Amicus Curiae in support of Petition for Certiorari at 15.

The policies in favor of determining adherence to a strict accuracy standard by use of an averaging

procedure are persuasive. While it is clear that the standard enforced is true net quantity to the purchaser, it is equally obvious that *not even all of the resources of all of this nation's weights and measures officials combined would be sufficient to inspect each package of every commodity produced which bears a weight representation.*[32] Rather, adherence to this truth in labeling standard depends upon the good faith packers —encouraged by sensible enforcement. It is equally apparent that a procedure which enables a weights and measures official to determine with accuracy the weight of thousands of packages by inspecting only a portion of those packages meets both the packer's right to fair treatment and the enforcement official's time and budgetary constraints. No right-thinking person would insist upon package by package inspection of a lot of 5,000 packages when modern statistics provide a valid procedure to determine the net quantity of those packages by inspecting only a sample. Thus, when a federal or State statute calls for accuracy and when a large number of packages must be inspected for compliance with that standard, it is logical *and* practical *and* fair to enforce that standard by use of a valid, statistical procedure which utilizes the accuracy-on-the-average standard.

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[32]The total impracticality of the package by package inspection procedure imposed by the circuit court is demonstratively evident from this, typical example. The State of Hawaii exported 5,365,680,000 cans of pineapple products in 1974. To require package by package inspection of just this one commodity to verify the accuracy of the label weight statements would require that each of *5,000 employees weigh* 350,000 cans per year or 1,000 cans per day or 125 cans per hour or *2 cans per minute.*

Use of a statistically valid lot inspection procedure such as California's Article 5 or Handbook 67 (*see* text *infra*) would accomplish the same task in literally a fraction of the time and with a far more efficient use of enforcement officers' time.

The Handbook 67 procedure was adopted after thorough consultation with weights and measures officials and representatives of the packaging industry and has received widespread acceptance in industry (which uses similar average accuracy procedures) as well as being used by most of amici curiae.

The California enforcement procedure, Article 5, use of which the district court enjoined,[33] was adopted in 1960 and is based upon the same principles as Handbook 67—inspection by lots, determination of compliance by accuracy-on-the-average and requiring enforcement action only when the average weight of a lot inspected is less than the weight stated. These procedures were adopted pursuant to the authorization in California Business and Professions Code section 12211.[34]

The district court found Article 5 to be statistically valid. 357 F.Supp. at 533. The circuit court accepted that finding. 530 F.2d 1301.

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[33]The circuit court broadened the district court's injunction to include subchapter 2.1, the State enforcement procedure adopted after the district court voided the federal regulation. In order to comply with the circuit court's holding pending review in this Court, subchapter 2.1, has been superseded and amici do not discuss it, except as it may bear upon other aspects of the circuit court's holding and to note that subchapter 2.1, an enforcement procedure commanding strict accuracy in each package, was voided by the circuit court in part because it required removal from sale of only underweight packages. The circuit court held subchapter 2.1 to offend the FPLA as it did not require enforcement action against *over*weight packages. 530 F.2d at 1328. That holding does not protect anyone, defies reasonable application of the law and would require wholly unnecessary expenditures of time and money to remove from sale technically out of compliance, but otherwise unobjectionable, overweight packages. The circuit court's rejection of subchapter 2.1 is neither compelled nor suggested by a fair reading of the FPLA. It also results in higher costs to packagers and therefore to purchasers.

[34]The text of Cal. Bus. & Prof. Code § 12211 is set out in Appendix C, *infra,* at 13-15.

Thus the California standard is true weight to the consumer which, out of the practical necessities discussed *supra,* is enforced by use of the accuracy-on-the-average procedure approved and recommended by NBS, the federal agency with expertise in weights and measures.

(b) *The California Standard Is Not in Conflict With the Federal Standard*

The circuit court held that section 12211 and Article 5 *establish* a net weight *standard* (1) *different than* that established under the FDCA (relying entirely upon the discussion in the same court's opinion in the *Rath* case) (530 F.2d at 1326), and (2) *less stringent than* that required by the FPLA (*Id.* at 1326-27.)[35] Each of these holdings is error.

First, the circuit court's holding of difference between State and federal law is predicated upon its erroneous belief that 21 CFR 1.8b(q) is part of the definition of the offense of misbranding under the FDCA. This conclusion is contrary to *United States v. Shreveport Grain & El. Co., supra,* 287 U.S. 77, discussed *supra* at 17-18, in which this Court held that the proviso for reasonable variations is not part of the offense of misbranding under the FDCA. Even if that decision is to be overruled, the circuit court still fails to recognize that products subject to both the FDCA and FPLA must meet the stricter FPLA standard of true weight to the consumer. (Discussed *supra* at 26-29.)[36]

[35]The circuit court also holds that Cal. Bus. & Prof. Code § 12607 is less stringent than the federal standard for the reason that Calif. Bus. & Prof. Code § 12614 expressly recognizes causes for variations in addition to those permitted by the federal regulation. There is at least one flaw in the court's analysis: *§ 12614 was repealed four years before the complaint in this action was filed.* 1969 Calif. Stats., ch. 1309, p. 2643, § 2.

The court concludes, however, that § 12613 prevails over § 12614 (530 F.2d at 1327) and thus the lower court's failure to observe the repeal of the other statute is not crucial to the court's holding.

Second, the circuit court is in error in its conclusion that section 12211 and Article 5 set a *standard*—they do not; they represent only an enforcement procedure for achievement of the statutory standard by use of a practical, common-sense, equitable approach. *See* Handbook 67 and *Cf. United States v. Shreveport Grain & El. Co., supra.*

Third, as the California laws in question (§ 12211 and Article 5) are only a *procedure* to determine compliance with the California statutory *standard* of true net quantity to the purchaser (§§ 12024, 12603 (b))—the same standard as that required by the FPLA (530 F.2d at 1326, n. 4)—they are not less stringent than that of federal law.[37]

The circuit court's contrary conclusion is predicated upon its erroneous view that California's testing of

[36]And assuming, *arguendo,* that products which would otherwise be subject to both the FDCA and FPLA are subject to regulation under FDCA standards alone, then the circuit court applied the wrong test, that of *difference* from the federal law. As is clear from the authorities cited by amici *supra* at 23-26, (1) the proper test is whether the State and federal laws are in *irreconcilable conflict* and (2) there is no such conflict in this case.

[37]The circuit court also criticizes Article 5 because the variations which it may permit could be greater than those permitted by 21 CFR 1.8b(q). 530 F. 2d at 1326-27.

First, the lower court is inconsistent, as earlier in its opinion it holds that the FPLA demands "the strict standard of accuracy." *Id.* at 1326 n. 4.

Second, the variations recognized by Article 5 are dependent upon the variations *within* the lot of product inspected, so that they cannot be based upon extraneous factors as the circuit court implies.

compliance by use of an averaging procedure and the limiting of enforcement actions to lots which are short-weight amount to a material alteration of the federal standard. *Id.* at 1326. That conclusion is simply erroneous and wholly ignores the impossible burden which it places upon enforcement officials—whether federal or State.

As amici have set out *supra* at 35-36, the use of practical enforcement procedures is crucial to efficient use of the States' limited resources. It defies logic and sound policy to compel action where there is no material injury—compelling enforcement action against overweight packages is hardly an enlightened view of prosecutorial discretion—and must be rejected. The circuit court's command that California must act against overweight packages as well as those which are underweight simply does not give any weight to the practical necessities of weights and measures enforcement, but rather commands a misallocation of limited resources.

Fourth, packers can and must be required to so package and fill their products so that the purchaser receives full measure.

Properly interpreted to carry out their shared Congressional purposes, both the FDCA and FPLA assure accuracy at the consumer level. Any variations in weight sanctioned by statute or judicial construction must be those necessary to achieve this purpose and statutory command. This is the reason why Handbook 67 permits overpacking and this is the basis for EPA's command in its regulation that products which may lose weight must be packaged so that the statement of quantity will be accurate *when purchased*. The circuit court's

conclusion that the federal laws preclude overpacking so that the consumer will not be deceived is supported neither by law nor policy. *See City of Seattle v. Goldsmith,* 131 P.2d 456, 458-59 (1913); *But see Overt v. State,* 260 S.W. 856, 858 (1924).

Nor is the lower court factually correct. The circuit court's reliance upon the district court record is unduly selective. While there is evidence that California is a state of climatic differences, there is also empirical evidence that humidity is not so extreme that it would create the burden which the circuit court envisions (530 F.2d at 1327)[38] but which the district court must have considered and found so insignificant that it did not even mention in its opinion. *Id.* at 1329-30.[39] (*See* affidavit of James W. Robey [Cl. Tr. at 305; Appendix B, *infra* at 4].)

Finally, the decision below is contrary to the principles affirmed by the second circuit in *General Mills,*

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[38]The requirement that packers ascertain and prepare their products for the distribution process is proper and fair. Processors of milk and other dairy products (all subject to the FDCA and FPLA) must package their products to minimize bacteria growth and cannot successfully complain when their products are removed from retail sale because they do not meet the wholesomeness standards of the State in which they are sold. *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, supra,* .... U.S. ...., 96 S.Ct. 923, 930-31 (1976). There is no greater burden imposed when the subject regulated is misbranding.

[39]This court has previously sustained a local ordinance which requires "overpacking" to meet a local regulation, the purpose of which is to prevent deception in the sale of foodstuffs. Thus, in *Schmidinger v. Chicago,* 226 U.S. 578 (1913), the Court noted that it was not unreasonable for Chicago to require extra dough to be scaled so that, *when sold,* the baked bread would be the standard weight of 16 oz. *Id.* at 586, 588.

Schmidinger also points up the obvious answer to both the bakers' and the millers' problem—wrap the product so that it will not lose moisture. There is an obvious benefit from doing so—it preserves the quality of the product.

Inc., et al. v. Furness, 398 F.Supp. 151 (S.D. N.Y. 1974), *aff'd.* 508 F.2d 836 (1975). In *Furness* the court rejected General Mills' contention that the FDCA and FPLA preempted a New York City ordinance regulating the weight of prepackaged commodities. In so doing the court (1) upheld use of Handbook 67 as a means of establishing *prima facie* violations of the New York City net weight ordinance and (2) rejected the millers' argument that the City's activities in assuring honest weights and measures were preempted by the FPLA.

The opinion of the court below stands in stark contrast to that affirmed by the Second Circuit.

The Second Circuit affirmed the use of a lot averaging system; the Ninth Circuit rejected use of such a system. The New York court predicated its opinion upon the recognition that weights and measures enforcement is inherently a matter of local concern; the Ninth Circuit found that the FPLA preempted State activity and all but eliminated California's power to prescribe permissible variations.

Amici contend that the validation of use of Handbook 67 evidences a proper concern for practical, effective weight testing procedures. As the California procedure utilizes the same principles as Handbook 67, its use should not have been voided by the lower court. Nor is there any basis for the circuit court's conclusion that the California standard and procedure impermissibly conflict with their federal counterparts.

vii. Affirmance of the Circuit Court's Holding Would Have a Substantial, Adverse Effect Upon Consumers, Honest Businesses and Upon the States' Ability to Enforce Truth in Packaging Laws

The circuit court's invalidation of a weight testing procedure which utilizes the NBS Handbook 67 principles of true weight on-the-average and the focusing of enforcement action upon lots which are shortweight, is of substantial concern to amici as we use either Handbook 67, Article 5, or a procedure based upon the same principles. Thus, invalidation of the particular procedure in question would cast doubt upon our ability to use a similar procedure. We cannot properly discharge our duty to prevent false weight statements in the marketplace if we must abandon a statistically sound method of inspection; nor does it make sense to be compelled to order off-sale overweight packages.

The impact of the circuit court's holding is not limited, however, to problems of enforcement procedure. As dramatic as would be the impact of the lower court's opinion, if affirmed, upon the enforcement ability of the States, of even more serious concern is its impact upon consumers, including businesses.

This impact is a direct consequence of the circuit court's holding that "reasonable" shortages must be permitted. Substitution of this nonstandard of "reasonable" shortages in each package for the present standard of true weight to the purchaser will harm not only the retail consumer-homemaker, but will in fact be felt severely, and in the first instance, by our nation's wholesalers and retailers who buy in packages of larger

unit size. The baking company which buys flour in sacks labeled "50 lbs. Net Wt." and the chain store that buys thousands of boxes of meat cuts similarly marked are entitled to receive full measure. If the merchant receives less, he must pay an additional sum to make up the difference. (The baker cannot simply add water to his recipe to compensate—the quality of his product and thus his business will suffer the adverse consequences.) And, just as the merchant-purchaser must pay the "extra" sum to buy the wheat to which he was entitled, *he must also pass that cost (with markup) on to the consumer.*[40]

These additional costs—to purchasers, both merchants and consumers—will be staggering. NBS has estimated that $900 *billion* of products are sold annually on the basis of weight.[41] This means that for every one percent shortage, businesses as well as consumers must pay billions of dollars for something they do not receive. Even if the seller gives the buyer a price "reduction" to offset the shorter measure, purchasers must still spend billions of extra dollars to purchase that which they thought they were getting initially.

Thus, if the present system which requires true weight to the consumer and business purchaser is replaced by one permitting absolute shortages in each package, there will be serious inflationary consequences.

There will also be serious anti-competitive effects. A packer who can reduce his price to a retailer, making it up by putting less in the package, can steal the

[40]*See* appendix A, *infra* at 1-3, for examples of the impact of affirmance of the circuit court's holding.

[41]*See* n. 4, *supra.*

unknowing customers of his competitors.[42] In order to meet the price break of the less than scrupulous industry member, his fellows will be forced to follow suit or lose their market share. Once the standard of true weight to the consumer is breached, there is no way of controlling the consequences.

There are also practical enforcement problems not discussed previously. The circuit court would depart from the single national standard of true weight to the purchaser, substituting the supposed standard of "reasonable" shortages in each package.

Can such a "standard" be enforced? *Absolutely not!* There is no way a weights and measures inspector can know the manufacturing capabilities and procedures or practices of the hundreds of thousands of domestic packagers let alone the capabilities or procedures or practices used in the scores of foreign countries which export products to the United States. Moreover, there is no sound reason why each time a package is found to be short weight, the weights and measures inspector should be forced to become sufficiently acquainted with those manufacturing procedures, practices or other factors as would be necessary to determine whether the shortages found were "reasonable."

Packers know the capability of their machinery and the characteristics of their products. They place the weight statements on their packages fully expecting purchasers to rely upon them and derive the benefit of the sale of their products as they mark and market them. Further, they know the distribution pattern for their products and can ascertain the expected loss of product weight (whether from leakage or other-

[42]*See* Appendix A, *infra,* at 1 for examples of the method by which this anti-competitive practice is carried out.

wise) prior to sale. It is therefore not unreasonable to require that packers and manufacturers shall overcome any such loss by proper packaging and filling.[43]

Finally, as there is no feasible manner in which the standard imposed by the circuit court can be enforced by the States, there would be no enforcement at all. FDA simply does not have the staff to do the job. Federal inspectors do not examine packages at retail. *General Mills v. Furness, supra,* 398 F.Supp. at 153. And regrettably FDA's record of enforcement of even federal adulteration standards has been less than adequate.

Senate Report No. 94-684 (94th Cong., 2d Sess.) (1976) contains a disquieting description of FDA enforcement problems:

> ". . . [A]fter having spent over $6.5 million to determine the extent of the mushroom crisis, FDA revealed that in fiscal year 1974 it *could not* conduct 10,000 food sanitation inspections in priority industries such as the fish, shellfish, dairy, and grain product industries. This disclosure coupled with a GAO report which showed that in 1972 food plants were inspected by the FDA on an average of *only once every 5 to 7 years* demonstrated the need for an expanded inspection effort and accompanying regulatory reform to facilitate that effort.
>
> ". . . .
>
> "In 1972, a GAO report [fn. omitted] revealed that between 1969 and 1971, *3,300 firms refused to cooperate with FDA* inspectors *10,000 times* when they were asked to make processing records accessible to the agency. The lack of cooperation

[43] *See* nn. 38 and 39 *supra.*

> by many manufacturers often prevents FDA from making valid assessments of whether violations of the Act occur, and even when violations are discovered, *reinspections and followup actions are not always feasible because FDA's inspection resources are so limited. Sanitation violations are often left uncorrected because FDA has neither the time nor the money with which it can effect legal action.* Even when instituted, corrective actions are not without difficulty. For example, according to GAO, the average time required to remove a violative product from the stream of commerce through seizure was 54 days, and when seizures were attempted, *adulterated or misbranded food products were often found to have been removed from the premises before FDA could take effective action.* GAO also found that good faith reliance upon a processor's promise that he would voluntarily withhold products from shipment had more than not, proven unwarranted." *Id.* at 4. (Emphasis added.)

Moreover FDA does not have the authority to detain either adulterated or misbranded products pending commencement of libel proceedings. *See* 21 U.S.C. § 334.

Amici do not wish to be critical of FDA. We do want, however, not to be enjoined from protecting our citizens from fraud in the marketplace.

To affirm the circuit court's allowance of "reasonable" shortages would seriously frustrate our ability and our efforts to protect the legitimate expectations of our citizens and their justifiable reliance upon their government to enable them "to obtain *accurate* information as to the quantity of . . . contents and . . . [to] *facilitate* value comparisons." 15 U.S.C. § 1451.

viii. The Federal "Reasonable Variations" Regulation Does Not Set an Ascertainable or Enforceable Standard; the States Cannot Be Restricted by an Unascertainable Federal Requirement[44]

Amici contend that because the FPLA requires full measure and accurate net quantity statements to purchasers[45] the federal "reasonable variations" regulation, 21 CFR 1.8b(q), cannot validly alter this standard. *Supra* at 26-29. Amici also contend, upon the authority of *United States v. Shreveport Grain & El. Co., supra,* 287 U.S. 77 (1932), that this regulation does not affect the statutory definition of the offense of misbranding under the FDCA. *Supra* at 17-20.

The lower courts in the present case held, however, that the reasonable variations proviso of the FDCA did constitute a permissible delegation of the Congressional power to *redefine* the offense of misbranding. Further the circuit court read into the FPLA a similar, substantive reasonable variations proviso. *Supra* at 38-39 and n. 37. The district court held that the Secretaries of Agriculture and Health, Education and Welfare had failed to exercise their power properly, holding the regulations in question to be void for vagueness. 357 F.Supp. at 534; 530 F.2d at 1330; *see id.* at 1308-12. The circuit court concurred in the district court's validation of the power to delegate but also found that the particular regulations in issue were valid, reversing the district court. *Id.* at 1324.

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[44]Amici discuss at this point both the FDCA-FPLA and WMA regulations providing for "reasonable variations" because their terms are virtually identical (see *supra* at n. 12 and *infra* at n. 53) and as they present the same issues of nonenforceability and effect upon State powers.

[45]Amici also contend that if the FDCA standard is lower than that of the FPLA, the latter must prevail. (*See supra* at 26-29.)

Assuming, *arguendo,* that the circuit court's overruling of Shreveport is appropriate and that the statutory standard under the FDCA, FPLA and WMA is true weight subject to reasonable variations, amici contend that the present regulations, 21 CFR 1.8b(q)[46] and 9 CFR 317.2(h)(2),[47] do not set an ascertainable standard to govern *either* packers' or enforcement officials' conduct.

First, there is no way in which an enforcement official—whether federal or state—can apply the nonstandard of these regulations to determine whether product is to be removed from sale, or criminal proceedings commenced for misbranding. (*See* 21 U.S.C. §§ 333 and 676 providing for criminal penalties for violations of the FDCA and WMA respectively.) The district court correctly pointed out the problem: "Under the regulation as it is written one meat inspector may conclude that x% loss of moisture can be expected. Given the same factual context, another meat inspector may come to the conclusion that y% loss of moisture is reasonable. Delegation of 'administrator's function' has never included giving each enforcement officer the 'keys to the jailhouse'." *The Rath Packing Co. v. M. H. Becker, et al.,* 357 F.Supp. 529, 534, n. 3 (C.D. Cal. 1973.) Nor is there any standard upon which a *packer* can rely.

The irony of the circuit court's action is that weights and measures laws are no longer to be enforced by weighing, measuring or counting. The circuit court destroys the prior, long standing and justifiable reliance —by enforcement official and packer alike—upon both

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[46]The test of this regulation is set forth *supra* at n. 12.

[47]The text of this regulation is set forth *infra* at n. 53.

a definite standard and scientific sampling plans (such as NBS Handbook 67 and Article 5) to objectively and fairly determine compliance with that standard.

Second, the circuit court was simply wrong in relying upon the test of the "ordinary negligence case" (530 F.2d at 1309, 1324) to reinstate the regulations in issue. The determination of what conduct is to be subjected to criminal sanctions must depend upon either a standard clearly set forth in a regulation or upon a standard ascertainable by a meaningful referent. *United States v. Cohen Grocery Co.*, 255 U.S. 81, 86 (1921); *accord United States v. National Dairy Corp.*, 372 U.S. 29, 36 (1963).

In the instant case the district court correctly determined that there was no such standard or meaningful referent. The trial court specifically found that (1) the regulation on its face failed to set an ascertainable standard and (2) there was no uniform standard for use by enforcement officers. (357 F.Supp. at 534.) Yet the circuit court wholly ignored these findings by the trial judge and reinstated the regulation without giving it any meaningful referent.

In order to so hold, the circuit court had to ignore (1) prior rulings of this Court, cited above, which compel the conclusion that the regulations as reinstated are void for vagueness; (2) a clear opportunity to construe the regulations in question in the manner (a) authorized by the National Bureau of Standards, (b) adopted by USDA and EPA, (c) in fact utilized by virtually all of the States; and (3) the published concession by the Food and Drug Administration that its regulation was not sufficiently definite.[48]

[48]FDA has itself expressly acknowledged that its reasonable variations regulation is indefinite. Thus, in adopting a set of regulations including the one in question at 32 FR 10729 (July 21, 1967), FDA specifically acknowledged its responsibility to promulgate *specific standards* for determining whether any variation is reasonable or unreasonable. To this end the FDA Commissioner stated:

> "7. Proposed § 1.8b(q) is revised and calls for the net quantity statement to express an accuate statement of the quantity of contents of the package."

Then, after stating the terms of the regulation, the Commissioner continued:

> "At a later date the Commissioner will propose an amendment to section 1.8b(q) to specify a means whereby industry and State and Federal Government may make a *definitive determination whether any variation is reasonable or unreasonable.*" 32 FR at 10730. (Emphasis added.)

Thus, while FDA, the agency charged with interpretation of the regulation in issue, has acknowledged that it has not sufficiently defined the enforcement standard, the court below sustains that very regulation. *See also*, n. 24, *supra*.

Thus the court below both ignores a construction of the regulation which would have a meaningful referent and ignores decisions of this Court which compel the conclusion that the regulation is void for vagueness.[49]

[49]In validating the regulation the court below relied in large part upon this court's decision in *United States v. Shreveport Grain & El. Co., supra*, 287 U.S. 77 (1932). However, as the District Court points out, 357 F.Supp. at 534, *Shreveport* does not reach the question presented in the instant case: the redelegation to each USDA compliance officer of deciding whether in "his judgment" a variation (caused by an unknown) is or is not "reasonable."

The circuit court also relies heavily upon validation by Congressional inaction: "Forty-two years of Congressional silence is strong evidence that Congress has acquiesced in the Secretary's interpretation of the scope of his powers." 530 F.2d at 1312.

First, the logic of this assertion is questionable—even long-standing acquiescence in unconstitutional activity cannot correct constitutional infirmities.

Second, Congressional inaction may, in fact, stand for approval of the States' activity in this field.

Third, the absence of Congressional action on any question is hardly evidence of more than the inherent complexity and slowness of the legislative process. *See National Petroleum Re-*

(This footnote is continued on next page)

Third and of vital importance, notwithstanding the first and second points, *there is no way in which the States can enforce these federal regulations.* How can State enforcement officials know what FDA and USDA's interpretations of reasonable variations would be in each of millions of specific cases? Must each weights and measures inspector telephone Washington, D.C., or even a federal regional office, each time he or she finds a short-measure package to get the authorization to remove that package or lot from sale?

An affirmative answer to this question means the end of effective weights and measures enforcement and the end of the power of the States to act in this sphere of traditionally State concern. Nor is there any way State (or federal) inspectors can know what went on inside a packing plant in another State or in a foreign country, making determinations of what is "good manufacturing practice" extremely difficult, if not impossible.

Clearly the case law under the FDCA and the Congressional recognition in the Wholesome Meat Act of the *concurrent jurisdiction* of the States to enforce misbranding requirements (21 U.S.C. § 678, *see infra* at 58-61) must mean that the States may apply our own enforcement procedures so long as they are not in irreconcilable conflict with federal law.

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finers Assn. v. F.T.C., 482 F.2d 672, 695-97 (D.C. Cir. 1973), *cert. denied* 415 U.S. 951 (1973), citing *Power Reactor Development Co. v. Int. Union of Elec. Radio & Machine Wkrs.*, 367 U.S. 396, 409 (1961) (imputing Congressional ratification to a disputed administrative construction of its powers is "shaky business." In the instant case it is an assertion resting upon quicksand). And as the Congress has never had the occasion to review by legislative change the Secretary of Agriculture's enforcement of the Wholesome Meat Act, citation by the court below of *Red Lion Broadcasting Co. v. F.T.C.*, 395 U.S. 367, 381 (1969) and *Flood v. Kuhn*, 407 U.S. 258, 283 (1972) is inapposite.

The circuit court clearly erred in holding that California's enforcement procedure, even if, *arguendo*, it sets a standard, is in irreconcilable conflict with federal law.

To submerge State enforcement efforts in a sea of vague, if not void, lesser federal nonstandards is to remove one of the States' fundamental powers and frustrate one of our basic responsibilities. Amici contend that such a revolution was not intended by Congress—it should not be permitted by this Court.

C. The Wholesome Meat Act Does Not Preempt State Laws Requiring True Weight to the Consumer

The Wholesome Meat Act (WMA) amendments of 1967 (81 Stat. 584 *et seq.;* 21 U.S.C. § 601 *et seq.*) constituted a major revision of federal involvement in the regulation of meat and meat food products in or affecting interstate commerce, first codified in the Federal Meat Inspection Act of 1907 (34 Stat. 1260 *et seq.*).

The most significant aspect of the WMA was the establishment of the program of federal financial assistance to State meat inspection programs to assure that local programs enforce standards at least equal to those enforced in plants subject to federal inspection. (Title III.)[50]

The WMA amendments also incorporated for the first time the term "misbranded," following the FDCA definition. Other terms, including definitions of the terms label and labeling, also are either the same as, or substantially similar to, those used in the FDCA.[51]

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[50]The other major revisions in this statute are set out in Senate Report No. 799, 90th Cong., 1st Sess., 2 1967 U.S. Code Cong. & Admin. News 2188 *et seq.*

[51]*Id.* at 2195-97.

The statutory schemes of the WMA and FDCA are not, however, identical. The most significant difference relevant to the present discussion is the inclusion in the WMA of section 408, 21 U.S.C. § 678, which adds preemptive language not present in the FDCA and different from that used in § 12 of the FPLA. The principal issue to be resolved in the *Rath* case is the effect, if any, of § 408 upon the well-established and recognized power of the States to assure our consumers of the wholesomeness of meat and meat food products and of the accuracy of representations made upon packages of such products.

WMA § 408 (21 U.S.C. § 678) provides:

> ". . . any State . . . may, *consistent with* the requirements under this Act, exercise *concurrent jurisdiction* with the Secretary over articles required to be inspected under [this] title, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded. . . ." (Emphasis added.)

Section 408 also provides:

> "Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this Act may not be imposed by any State . . . with respect to articles prepared at any establishment under inspection in accordance with the requirements under title I of this Act. . . .[52]

[52]Amici have set out these particular provisions in this manner so that the Congressional statement of concurrent jurisdiction will not be obscured. Section 408 in its entirety provides:

> "Requirements within the scope of this Act with respect to premises, facilities and operations of any establishment at which inspection is provided under title I of this Act, which are in addition to, or different than those made under this Act may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 202 of this Act, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this Act may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under title I of this Act, but any State or Territory or the District of Columbia may, consistent with the requirements under this Act, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said title, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This Act shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this Act, with respect to any other matters regulated under this Act."

The circuit court held State laws requiring *accuracy* in package label statements were preempted by the clause of section 408 which precludes different State *labeling* requirements. 530 F.2d 1295, 1313-14. The lower court also held that the United States Department of Agriculture (USDA) regulation permitting reasonable variations, 9 CFR 317.2(h)(2),[53] altered the absolute accuracy standard of the WMA (*id.* at 1314) and that California law differs from the WMA and is therefore invalid. *Id.*

[53]This regulation, which is substantially identical to 21 CFR 1.8b(q), provides:

> The statement as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packing substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

Amici contend that each of these conclusions by the circuit court is erroneous. Indeed, while the statutory schemes of the WMA and the FDCA are in many instances parallel, there are reasons peculiar to the WMA which lend additional support to amici's contention.

i. The WMA Does Not Pr. empt State Laws Requiring Accuracy to Purchasers

(a) *The WMA Preempts Only Differing State Laws Concerned With Label Format*

The circuit court summarily concluded that the term labeling included accuracy. 530 F.2d at 1313, 1314. Assuming, *arguendo,* that Congress may prescribe a uniform national labeling standard, amici contend that the Congress specifically limited its preemption to label *format* only.

Acceptance of amici's position is compelled by the manner in which the terms label and labeling, on the one hand, and misbranding, on the other, are defined; and by the purposes of the WMA itself.

First, the terms label and labeling are defined in the WMA separately from the term "misbranding." (Compare 21 U.S.C. §§ 601(o) and (p) with 21 U.S.C. § 601(n)(1-12).) Thus the term label means a *display* of written, printed, or graphic matter upon the immediate container (not including package liners) of any article. 21 U.S.C. § 601(o). And the term labeling means "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." 21 U.S.C. § 601(p).

By contrast, a product is "misbranded" if it is in a package "unless it bears a label showing . . . (B) an *accurate* statement of the quantity of contents in terms of weight . . ." 21 U.S.C. § 601(n)(5). (Emphasis added.)

The definition of the terms label and labeling emphasize display and graphics, *i.e., form* and format, while the definition of misbranding is concerned with the *accuracy* of that information. Also, in common parlance, labeling refers to the text and its placement while misbranding refers to the accuracy of label texts. The circuit court's contrary conclusion—that misbranding and labeling are one in the same (530 F.2d at 1313, 1314) fails to appreciate this logical and important distinction.

Second, the position advanced by amici is fully supported by policy considerations. While under our interpretation the States cannot impose additional requirements of different placement of information upon a label, or require different type size, we may *verify* the veracity of the representations made therein.

For example, if a product label claims that it is 100% beef, a State could not additionally require that this particular phrase be set apart from, or be in contrasting color to, the rest of the information on a label meeting USDA's format criteria; but State (as well as federal) inspectors could check the product to determine the *accuracy* of this claim. Or, to borrow an example from the FDCA, the States clearly have the right to reinspect a bottle of "100% Pasteurized, Vitamin D. Milk" to assure its wholesomeness and the accuracy of its label. *Cf. Great Atlantic & Pacific Tea Co. v. Cottrell, supra,* .... U.S. ...., 96 S.Ct. 923, 930-31 (1976).

Amici's interpretation gives full weight to the need for uniform national label format standards and equally full consideration to the *far more important* policy objective of assuring the *accuracy* of those representations both as to misbranding and adulteration.[54]

(b) *The WMA Confirms the Concurrent Jurisdiction of the States to Enforce the WMA by Consistent State Action*

Section 408 specifically confirms the concurrent *jurisdiction* of the States to exercise authority over articles subject to the WMA once they are outside the packing plant. The sole statutory restriction upon this jurisdiction is that its exercise be "consistent with" WMA requirements.[55]

There are crucial distinctions between this language and that relating to marking, labeling, packaging and ingredient requirements. First, this concurrent *jurisdiction* clause does not contain an absolute prohibition against different State laws, rather it says State standards must only be "*consistent with*" WMA requirements. Second, this clause expressly recognizes the concurrent *jurisdiction* of the States. Use of the word jurisdiction cannot be considered insignificant. Rather, giving proper appreciation for the terms which the Congress used, it must be concluded that the Congress intended to continue the jurisdiction of the States over foodstuffs—an area of traditional State concern, *e.g., Florida Lime*

[54]The legislative history of the WMA and of the analogous Poultry Products Inspection Act (*see* n. 3, *supra*) note only that the terms under discussion are essentially the same as in the FDCA. Senate Report No. 799 (90th Cong., 1st Sess., 2 1967 U.S. Code Cong. & Admin. News 2188, 2196); House Report No. 1333 (90th Cong., 2d Sess.) 3 1968 U.S. Code Cong. & Admin. News 3426, 3445).

[55]The text of § 408 is set out, *supra* at n. 52.

& Avocado Growers Inc., et al. v. Paul, supra, 373 U.S. 132 (1963)—*to the greatest extent possible,* restricting that authority only as absolutely necessary.

Indeed this construction is entirely consistent with that of the only other appellate case construing § 408. In *Armour v. Ball,* 468 F.2d 76 (1972), the Sixth Circuit specifically confirmed this broad interpretation of the authority of the States. *Id.* at 84.[56]

Had the Congress wished to additionally restrict the authority of the States over adulteration and misbranding, *e.g.,* to preclude State misbranding or adulteration standards which are "in addition to or different than" federal requirements, it clearly had the language close at hand.

To the contrary the Congress unequivocally confirmed the *jurisdiction* of the States over misbranding and adulteration and emphatically made it *concurrent.*[57]

[56]Of equal importance is the fact that the Michigan law there considered imposed an *ingredient* requirement different than that established by USDA—requiring 12% protein as opposed to the USDA standard of 11.2% (*id.* at 82) and imposed label *format* requirements (*id.* at 88). No label *accuracy* requirements were enjoined (or apparently in issue). *See id.* at 88. Thus *Armour v. Ball* is not contrary to the position advanced by amici.

[57]The legislative history of § 408 is consistent with amici's position that the States have broad power concerning adulteration and misbranding.

Thus Senate Report No. 799 (90th Cong., 1st Sess.) states:

> Section 408 would exclude States, territories, and the District of Columbia from regulating operations at plants inspected under title I or from imposing marking, labeling, packaging, or ingredient requirements in addition to or different than those under the Federal Meat Inspection Act for articles prepared under inspection in accordance with title I of the act, but would permit them to impose recordkeeping and related requirements with respect to such

(This footnote is continued on next page)

Nor do the Congressional debates on enactment of the WMA support a finding of preemption.[58] Rather, the absence of either legislative language, history or debate referring to removal from the States of our well established power to protect our citizens in these fields, must carry the implication that no such revolutionary restriction was intended.

What is the scope of the States' authority? Reference to an additional section of the WMA lends persuasive support to the conclusion that the States' latitude is as broad under the WMA as it is under the FDCA, *i.e.*, that the States, in the interest of protecting the health and welfare of our citizens, are limited in our activities only by the constutitional test of "frustration of congressional purpose."

Thus WMA § 402, 21 U.S.C. § 672, expressly provides for detention of products by federal officials[59] when there is reason to believe that such articles are adulterated or misbranded in violation of

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plants if consistent with the Federal requirements and *to impose requirements consistent with the Federal provisions as to other matters regulated under the act.*

2 1967 U.S. Code Cong. & Admin. News 2188 at 2207. (Emphasis added.)

The circuit court also concluded that the States had broad authority over misbranding (530 F.2d at 1314), but defined this term improperly to include both label format and accuracy. See *supra* at 56-58.

[58]It is well recognized that Congress will not preempt any State power without debate, certainly it will not create a revolution overruling basic, long-established principles of commerce. The Congress contains many individuals who are always ready to do battle on behalf of State power; they surely would have raised their voices in opposition to any expression of Congressional intent to preempt. Further discussion of the Congressional debates may be found in Appendix C, *infra* at 15 *et seq.*

[59]Enforcement activities by State officials are sanctioned by § 403, 21 U.S.C. § 673 and by § 408.

the WMA, or of "any other Federal law *or the laws of any State.*"[60] (Emphasis added.) *Accord* 9 CFR 329.1; House Com. on Agr., H.R. 11789 and Section by Section Analyses—A Bill to Amend the Meat Inspection Act, 89th Cong., 1st Sess., Oct. 28, 1965 at 27; Senate Report No. 799, 90th Cong., 1st Session, 2 1967 U.S. Code Cong. & Admin. News, 2188, 2207.

Thus in *United States v. 500 Pounds, etc.*, 319 F. Supp. 966 (N.D. Cal. 1970) the court interpreted § 672 as including situations in which a product is in violation of valid *State law*, even if not in violation of federal law.

ii. The WMA Requires True Weight to the Consumer

In enacting the WMA the Congress expressly declared its purpose to be the protection of consumers and competitors. 21 U.S.C. § 602; *accord Federation of Homemakers v. Hardin*, 328 F.Supp. 181, 184 (D.C. 1971) *aff'd.* 466 F.2d 462 (1972). Thus amici's discussion *supra* of FDCA and FPLA principles is equally applicable to the WMA.

Additionally, in defining misbranding under the WMA the Congress followed closely its FDCA definition[61] but made permissive rather than mandatory the adoption of regulations providing for reasonable variations. Thus, in enacting the WMA the Congress gave express recognition to this Court's holding in

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[60]The text of § 672 is set forth in Appendix C, *infra* at 12-13.

[61]Section 2 of the WMA, 21 U.S.C. § 601(n)(5) makes a product subject to the WMA misbranded "if in a package . . . unless it bears a label showing . . . an *accurate* statement of the quantity of the contents in terms of weight. . . . *Provided*, That . . . reasonable variations *may* be permitted . . . by regulations prescribed by the Secretary." (Emphasis added.) *Cf.* n. 10 *supra.*

United States v. Shreveport Grain & El. Co., supra, 287 U.S. 77 (1932) that the reasonable variations proviso is not part of the statutory offense.

Thus the WMA's prohibitions against distribution of adulterated food are absolute, as are those of the FDCA upon which the WMA amendments are patterned. The wholesale or retail sale of adulterated or misbranded meat food products is absolutely prohibited.

And thus the USDA regulation concerning reasonable variations, 9 CFR 317.2(h)(2)[62] cannot, as the circuit court erroneously concluded (530 F.2d at 1314), vary the offense of misbranding.

iii. The California Statute Is Consistent With the WMA Standard

In *Rath* the California laws found to violate the circuit court's interpretation of the WMA standard are identical to those discussed, *supra,* in connection with *General Mills.*[63] Thus the arguments presented, *supra* at 32-42, conclusively establish that (1) the California standard is identical to the federal standard—true weight to the purchaser—consumer or business,

[62]The text of the regulation is set out *supra* n. 53.

[63]These laws are discussed *supra* at 37-39. The circuit court also considered Calif. Bus. & Prof. Code § 12607 and Article 5.1, which was adopted after the district court's invalidation of the federal reasonable variations regulation. (357 F. Supp. at 534.)

As Article 5.1 has been superseded, its consideration may be viewed as a moot question. Even if still viable for purposes of this case, its validity depends upon whether § 408 permits or precludes States from enacting and enforcing laws which are *consistent with* even though technically "different from" WMA requirements and upon other considerations, all of which are discussed in the text, *supra,* and which would govern the special case of Article 5.1. For these reasons, amici do not separately discuss this regulation.

(2) it is logical and practical and fair to enforce this standard as to the billions of packages which are subject thereto by a statistically valid enforcement procedure which utilizes the principles of accuracy-on-the-average and only requires further action where there is a serious problem, *i.e.,* when the lot inspected is found to be shortweight.[64]

iv. Affirmance of the Circuit Court's Judgment Would Have a Serious Impact Upon the Nation's Consumers

The impact of affirmance of the circuit court's opinion in *Rath* is not substantially different from that of an affirmance of the *General Mills* judgment. Meat food products account for a large share of the $900 billion of products sold annually by weight or measure.

Further, the effect upon State enforcement is no less severe. Indeed, the officer in charge of the USDA Western Region Compliance Staff testified at the trial in case No. 72-607-R (the companion case to the Jones action) that he has only 7 compliance officers for the 12 western states (including Alaska and Hawaii); that these officers have *neither the training nor the equipment* to make the necessary retail level inspections and that *in fact* USDA *relies upon the States and upon state procedures to determine whether product is misbranded* (shortweight). [Cl. Tr. at 371-84.] It should be clear from the evidence that it is only by means of the enforcement action of Jones

[64]Even if *Shreveport* is no longer considered controlling and 9 CFR 317.2(h)(2) is considered to vary the definition of misbranding, California's regulatory scheme and enforcement procedure are still *consistent with* WMA requirements as they carry out the purpose of the WMA in a manner which does not frustrate the Congressional purpose. *Cf. Cloverleaf Butter Co. v. Patterson, supra,* 315 U.S. 148, 162 (1942); *Corn Products Refg. Co. v. Eddy, supra,* 249 U.S. 427, 438-39 (1919). *See* section IBviii *supra* at 48-53.

and other State and local weights and measures officials that the federal standard of true weight at retail is enforced. To accept the circuit court's holding that the federal standard is true weight subject to an undefined "reasonable variation—*i.e.*, "reasonable shortages" to the consumer—would impose an unenforceable nonstandard—it would compel local weights and measures officials to guess at what USDA would consider reasonable. This approach is hardly sensible when the NBS, the federal agency charged by Congress with coordinating States' weights and measures enforcement, has provided us with a method of determining with certainty and applying with uniformity, a known standard. It is ironic indeed for the Ninth Circuit to conclude that weight and measure cannot be determined by weighing and measuring.

A holding requiring the States to guess about what USDA might do *if* it had trained and equipped personnel would seriously impede the exercise of our duty to prevent deception in the sale of food products.

II

CALIFORNIA'S TRUTH IN PACKAGING LAWS ARE A VALID EXERCISE OF ITS RESERVED POLICE POWERS

Amici contend that a proper balancing of State and federal interests compels the conclusion that the California laws in issue are a valid exercise of the police power of the States.

The Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

While this Amendment is not a limitation upon the authority of the federal government to enact such legislation as is necessary and proper to the exercise of a power granted to it by the Constitution, it is a guarantee to the States that powers not granted are reserved to the States and that the States may fully implement our reserved powers except to the extent such State action conflicts with the proper exercise of a power granted to the federal government. *See, e.g., United States v. Darby,* 312 U.S. 100, 119-24 (1941).

That the Tenth Amendment may be characterized as "but a truism" (*id.* at 124) does not lessen its importance as confirmation of the nature of our government as *federal,* with both delegated *and* reserved powers. *See, e.g., Cooley v. Board of Wardens,* 53 U.S. (12 How.) 318, 341 (1851).

> "The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. . . ." *Fry v. United States,* 421 U.S. 542, 547 n.7 (1975).

This Court has repeatedly affirmed that among those powers described as police powers which were not delegated to the national government but are reserved to the States is the power to prevent fraud and deception in the sale of foodstuffs. Thus, in *Plumley v. Massachusetts,* 155 U.S. 461 (1894), in affirming the power of a State to forbid the sale of imitation butter in a manner which would permit confusion and the passing off of imitation butter for real butter,[65] this Court stated:

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[65]The police power extends beyond the power to prevent deception and fraud to the securing of our citizens "against the consequences of ignorance and incapacity."

> "If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be surrendered to the general government, *it is the protection of the people against fraud and deception in the sale of food products*." *Id.* at 472. (Emphasis added.)

Indeed the States' power to assure honesty in weights and measures predates our Constitution (*Turner v. Maryland, supra,* 107 U.S. 38, 51-55 (1882)) and has been repeatedly confirmed by this Court.

> "Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the State to intervene. *Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures,* the weighing of coal on public scales, and the like, are all competent exercises of that power. . . ." *Patapsco Guano Co. v. North Carolina,* 171 U.S. 345, 358 (1898). (Emphasis added.)

Accord, e.g., Schmidinger v. Chicago, supra, 226 U.S. 578 (1913) (laws "tending to prevent frauds and requiring honest weights and measures in the sale of articles of general consumption, have long been considered lawful exertions of the police power." *Id.* at 588); *see Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 202 (1824) (the power to enact inspection and health laws is reserved to the States); *see also Florida Lime & Avocado Growers Inc., et al. v. Paul, supra,* 373 U.S. 132, 144 (1963).

If our *federal* system is to have vitality, if the States are not to be made into mere administrative appendages of an all-powerful national (not *federal*) government, then full weight must be accorded the interests of the States in resolving any alleged conflict between the exercise of granted and reserved powers. The resolution of any alleged conflict should depend upon proper consideration of the legitimate interests of each governmental unit and a determination of whether in fact there exists an insurmountable conflict.

In the present case the interests of the federal government are the protection of purchasers—consumers and businesses—from misbranded packages and from unfair competition, enabling consumers to make accurate value comparisons, and assuring the free flow of commerce among the States.

The interests of the State of California are identical to those of the federal government—the assurance of truth in packaging, providing purchasers with information vital to the making of informed purchasing decisions and assuring the prosperity of commerce within the State.

As there is no question but that the State laws in issue are applied in a nondiscriminatory manner, it must be concluded that the State and federal objectives are in concert. Nor can it be overlooked that the FDA and USDA are ill-prepared to implement these shared objectives as their enforcement staffs are minimal and without either adequate training or necessary equipment. By contrast, California and amici States are adequately staffed with well trained and properly equipped personnel.

Amici submit that when these facts are considered together with the fact that the regulation of weights

and measures is traditionally a matter of local concern, the only proper conclusion is the validation of the States' power to enforce truth in packaging laws and Jones' power to enforce the laws in issue. A contrary result would not advance any federal interest and would only lessen the protection of consumers and of honest competition which the Congress intended.

As this Court has stated on more than one occasion, "The Constitution of the United States does not secure to anyone the privilege of defrauding the public." *Plumley v. Massachusetts, supra,* 155 U.S. 461, 479; *Patapsco Guano Co., supra,* at 361.

The sale of food products bearing false statements of net quantity is a particularly egregious violation of this principle. Its sanction by a federal agency raises questions in the minds of consumers as to whether there has been a proper balancing of consumer's and packager's interests. And the frustration by the lower court in this case of the exercise by California of its police power to prevent such deception raises at least as serious questions about the continuing vitality of the States in our federal system of supposedly shared powers.

Amici submit that a proper respect for the role of the States, for fair competition, for the needs of consumers and businesses to receive full measure, and for the needs of honest businesses to maintain consumers' confidence in their products, all compel the conclusion that Jones' utilization of the laws in issue was a proper exercise of California's police powers.

Conclusion

For these reasons, and each of them, the judgments of the court below should be reversed.

Respectfully submitted,

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APPENDIX A

Examples of Adverse Consequences to Commerce, Consumers and Businesses Resulting From Affirmance of the Circuit Court's Holding

The following are examples of the adverse consequences which will necessarily result if the concept of permitting "reasonable" shortages in every package—authorized by the court below—is permitted to stand.

1. Two supermarkets, A and B, are located across the street from each other. Supermarket A packages its hamburger in its own meat department and the Wholesome Meat Act (WMA) is inapplicable. Supermarket B purchases its meat prepackaged from a wholesaler to whom the WMA does apply.

The State in which the two markets are located has always required true weight to the purchaser. Supermarket A meets this standard and sell its full measure packages for 87¢ per lb. However, because the hamburger sold by supermarket B is subject to the WMA, under the circuit court's decision it need *not* comply with the State law requiring full measure when sold—*i.e.* there can be "reasonable" shortages in every package sold. As a result, supermarket B can sell its "one pound" packages of hamburger for 85¢. B prominently displays and advertises its two cents per pound price "savings." The owner of supermarket A complains to the local weights and measures official that B is defrauding consumers and engaging in unfair competition. The official sympathizes with the honest market-owner but points out that under the Ninth Circuit's decision supermarket B may *advertise* full weight yet sell what are in fact *short*weight packages at a lesser price.

The honest merchant continues to lose business to his competitor.

2. A grocery chain buys 1,000 boxes of ground meat to be repackaged into retail size packages. Each box bears the United States Department of Agriculture mark "Inspected and Passed" and a label containing the statement "Net Wt. 50 lbs." The boxes, prior to the Ninth Circuit's ruling, contained full measure when delivered to the stores.[1] Now, because of the "reasonable" shortages ruling of the Ninth Circuit, the boxes each contain between 47 and 49 pounds. The grocery chain is nevertheless billed for the full 50,000 pounds.

3. The United States Army buys 2,500 bags of flour, each labeled "50 lbs." In fact they contain between 45 and 49 pounds. When the contracting officer complains to the packer, he is told that the law allows "reasonable" variations, and the packer considers these shortages to be "reasonable." The supply officer contacts the United States Attorney who advises him that if such shortages are regular in the trade, that may be the definition of "reasonable variations," and besides, the government does not want to go to the expense of hiring experts on packaging machinery to try and prove what is "reasonable." The contracting officer pays the invoice and asks for an increased appropria-

[1]The determination of full measure was made by use of a statistically valid lot averaging procedure, whether it be the National Bureau of Standards, Handbook 67 (*see* brief, *supra*, at 34-35) or a similar procedure such as California's Article 5. Such a procedure enforces the accuracy requirement of the federal or State law by permitting individual boxes of ground meat to vary from stated weight so long as the average weight is the 50 pounds stated on the box. Use of such a statistically valid procedure allows the purchaser to determine the weight of the entire lot by weighing only a few packages, thus saving considerable time (see text at n. 32 *supra*).

tion for food as the shortages are rapidly becoming general.

4. A restaurant operator buys 20 cans of coffee, each labeled "Net Weight 10 lbs." In fact they contain 9½ pounds each. The restaurant owner does not realize that the cans are shortweight but he knows his costs are going up as the coffee just does not go as far as it formerly did. He is forced to raise his prices to pay for the "additional" coffee he must buy.

5. A school district buys 500,000 "half-pints" of milk a week for its school lunch program but the cartons are no longer accurately filled. Dairy farmers supplying the milk for the packages are told by the distributor that less of their milk will be needed hereafter. Their income declines.

6. A shopper in a grocery store compares three brands of canned tuna, all labeled the same weight, but shortfilled by different amounts. The lowest priced brand is packaged in a foreign country and is short filled the most. After continuing to lose sales to their competitor, the two domestic packagers lower their fill standards also. The foreign packer cuts still further to maintain its cost advantage. When the domestic packers complain to their weights and measures official, he tells them he can do nothing because he knows nothing about the packaging machinery in the foreign plant, and even if he did, how can he decide what is a "reasonable" shortage. He sympathizes with their loss of markets (but notes that they are now also short-weighting).

APPENDIX B

Affidavit of James W. Robey (Cl. Tr. 304-08)

County of Sacramento, State of California—ss:

AFFIDAVIT OF JAMES W. ROBEY

James W. Robey, being first duly sworn, states as follows:

1. I am now and at all times herein mentioned have been the acting program supervisor, quantity control program, Bureau of Weights and Measures, Department of Food and Agriculture, State of California.

2. I have been employed in the quantity control program of the Bureau of Weights and Measures since July 1, 1965.

3. As program supervisor, I am custodian of the package quantity inspection reports submitted by County Sealers of Weights and Measures in California and it is my duty to maintain statistical records relating to quantity inspection of packages.

4. During the first three weeks of July, 1973, I had my staff undertake a survey of the accuracy of flour being sold in California. This was done in response to allegations made in plaintiffs' pleadings and affidavits in this case alleging that shortages from label weight of flour should be permitted because of "reasonable variations caused by gain or loss of moisture during the course of good distribution practice and/or unavoidable deviation in good manufacturing practice."

5. I have read plaintiffs' Notice of Motion for Summary Judgment dated June 29, 1973, arguing that failure to allow for such shortages violates the United States Constitution by depriving the Plaintiffs of due

process of law, and by placing an unreasonable burden on interstate commerce; and arguing further that failure to allow such shortages is in violation of federal and California law.

6. I have also read the affidavits filed in this action in support of plaintiffs' Motion for Summary Judgment by Donald D. Coltitts dated May 14, 1973, Roger C. Miller dated May 2, 1973, and Henry Sumpter, Jr., dated May 2, 1973, all contending and purporting to show that loss of moisture causes shortage in weight of plaintiffs' flour and that it is impracticable, if not impossible, to package flour so as to sell it to consumers accurately labelled as to weight unless all packages are overfilled at enormous expense to plaintiffs to account for sale of some packages in areas of dry humidity.

7. My previous experience led me to question the accuracy of this position and I undertook this survey during July, 1973, to determine the facts under present conditions, using skilled technical personnel and accurate weighing equipment.

8. California is a state of great diversity of climate and humidity, including the dry and hot deserts and moist seaside areas. Plaintiffs' flour is sold in retail stores all over California and if plaintiffs' claims were true, there should be more shortages in the dry, hot areas than the other areas of the State. Because of the seasonal hot weather in July, this was a month most likely to support Plaintiffs' argument, if it were true. Consequently, packages of flour were tested against label weight in retail stores in the inland counties of Fresno, Riverside, San Bernardino, and Sacramento; and the coastal counties of Los Angeles, Santa Barbara, Monterey and San Francisco during the month of July.

9. The statistical results supporting this affidavit are on file in my office. In summary, this study showed the following:

(a) Sixteen per cent of all packages of flour tested were shortweight. In many cases, every package in the lot was shortweight. Plaintiffs' brands were not significantly different from competitor's brands.

(b) There was no correlation between the inland group of counties and the coastal group as to the percentage of shortweight packages.

(c) There was no correlation between the inland group of counties and the coastal group as to the percentage of shortweight in the deficient packages.

(d) In the inland counties, 15.76 per cent of all packages were shortweight while in the coastal counties, 16.57 per cent of all packages were shortweight. Shortages in individual packages ranged from a portion of 1 per cent to 14 per cent.

10. The inspectors making the test could make no determination in any case as to why any of the packages was shortweight. The reasons for shortweight packages could have been the following:

(a) The manufacturer intentionally set his machinery so that it would place into the containers less flour than the stated quantity.

(b) The manufacturer negligently maintained his machinery, or his scales, or both, so that the correct amount of flour was not placed into the packages.

(c) The original amount of flour placed in the packages was only sufficient to allow it to be accurately labelled at the time it left the plant, while the manufacturer knew that some evaporation of moisture would take place and that the packages necessarily would be shortweight when sold to consumers.

(d) Any combination of the factors had occurred.

11. From the results of this study, and from my experience as a weights and measures official, I draw these conclusions:

(a) It is not true that the loss and gain of moisture in flour presents plaintiffs with a special problem based on the area of sale of their flour.

(b) It is not true that plaintiffs are faced with any special problem resulting from "reasonable variations caused by gain or loss of moisture during the course of good distribution practice and/or by unavoidable deviations in good manufacturing practice." All of these deviations can reasonably be controlled so as to provide wholesalers, retailers and consumers with accurately labelled packages, as is true in the case of the packaging of other hygroscopic products. Flour is not unique. The same problems are found in packaging bakery products, rice products, meat and poultry products, fish products, and dairy products.

(c) Plaintiffs can, if they wish to, package their flour so as to be accurately labelled at the time of sale to wholesale and retail customers.

12. The continuing problem of shortweight flour requires excessive attention by weights and measures officials. If plaintiffs are allowed to continue to sell shortweight flour, this will impair the integrity of the weights and measures system upon which competing manufacturers, wholesalers and retailers must rely for a common standard; and in addition permit knowing and continuing misrepresentation to consumers. Plain-

tiffs weight label their products expecting purchasers to rely on that representation of weight at time of retail sale. The integrity of government is placed in jeopardy when weights and measures officials are asked to place a meaning on that representation which authorize shortweight and thereby authorize the deception of consumers.

The above stated matters are within my personal knowledge and if I am called and sworn as a witness, I can testify competently thereto.

Executed on this 1st day of August, 1973, at Sacramento, California.

/s/ James W. Robey
James W. Robey

Subscribed and sworn to before me this 1st day of August, 1973.

/s/ Barbara E. Russell
BARBARA E. RUSSELL
Notary Public in and for the County
of Sacramento, State of California

[Seal]

APPENDIX C

Statutes, Regulations and Legislative Materials

The Federal Insecticide, Fungicide, and Rodenticide Act, 61 Stat. 163, as amended by 78 Stat. 190, 193, 7 U.S.C. section 135(a) provides:[2]

> It shall be unlawful for any person to distribute, sell, or offer for sale in any Territory or in the District of Columbia, or to ship or deliver for shipment from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, or to receive in any State, Territory, or the District of Columbia from any other State, Territory or the District of Columbia, or foreign country, and having so received, deliver or offer to deliver in the original unbroken package to any other person, any of the following:
>
> . . . .
>
> (2) Any economic poison unless it is in the registrant's or the manufacturer's unbroken immediate container, and there is affixed to such container, and to the outside container or wrapper of the retail package, if there be one through which the required information on the immediate container cannot be clearly read, a label bearing—
>
> . . . .
>
> (c) *the net weight or measure of the content: Provided, That the Administrator may permit reasonable variations.* . . . (Emphasis added.)

[2]This statute was amended to transfer responsibility for its enforcement to the Administrator, Environmental Protection Agency, by 84 Stat. 2086. No substantive change was made to 7 U.S.C. § 135(a)(2)(c).

The United States Department of Agriculture issued an interpretation of this statute which has been adopted as a regulation by the Environmental Protection Agency, the agency now charged with its enforcement.

This regulation, 40 C.F.R. §162.104, provides:

Interpretation with respect to statement of net contents.

(d) *Permissible variations.* (1) If the contents are stated as a minimum quantiy, the package must contain at least the quantity claimed. No variation below this quantity is permitted and any variation above the contents stated must not be unreasonably large.

(2) The net content is considered to be the average net content unless stated as a minimum quantity. Where average net content is used:

(i) The average content of the packages in any shipment must not fall below the quantity stated and variation above the quantity stated is permitted only to the extent that it represents deviations unavoidable in good packing practice.

(ii) There must be no unreasonable variation from the average in the content of any package.

(e) *Allowance for loss.* A statement of net content "when packed" does not comply with the requirements of the act. The statement must be such that it will be correct as long as the economic poison is subject to the law. Thus, *if a product* such as borax *may lose weight by drying out when stored in paper bags,* it must be packed and labeled in such a way that *the statement of net content will be correct when the product is purchased.* (Emphasis added.)

Senate Report No. 1186 (89th Cong. 2d Sess.) reprinted in 3 1966 U.S. Code Cong. and Admin. News 4069 at 4071 states:

. . . .

The Senate Commerce Committee held 10 days of hearings on S. 985, and had before it five volumes of testimony taken in 1961, 1962, 1963, and 1964 by the Antitrust and Monopoly Subcommittee, on packaging and labeling practices in the marketing of consumer commodities.

Out of all these hearings there has emerged a pattern of marketing practices which the committee believes have substantially impaired the fair and efficient functioning of consumer commodity marketing. In particular, the hearings identified certain undesirable conditions and practices to which this legislation is principally directed. They include—

(1) *Confusing, inconspicuous, incomplete or nonexistent quantity of contents statements on labels*;

(2) Lack of uniformity in the designation of units of weight or fluid volume. Thus, a package may be labeled "1 qt. 1 oz." or "33 oz."; 1 pint," "16 ounces" or "1 half-quart";

(3) The use of qualifying adjectives to exaggerate the quantity of contents, such as "giant" or "jumbo" quart;

(4) The use of size characterizations, such as "small," "medium," and "large," and "servings" designations, without meaningful standards of reference;

(5) The imprinting on the package by the manufacturer of purported price information imply-

ing retail bargains such as "cents off" or "economy size" representations. In placing such representations on his package, the manufacturer is promising the consumer a price advantage which he cannot fulfill, for it is the retailer and not the manufacturer who determines the price which the consumer pays;

(6) Insufficient or nonexistent ingredient information, such as the failure to disclose the percentages of costly and inexpensive ingredients or active and inert ingredients; and

(7) The proliferation of awkward and fractional weights and quantities, in which many consumer commodities are being marketed. For example, potato chips have recently been marketed in 71 different quantities under 3½ pounds. And instant coffee is presently being sold in 2 oz., 2½ oz., 4 oz., 5 oz., 6 oz., 7 oz., 8 oz., 9 oz., 10 oz., etc., jars. The consumer is thus compelled to divide the retail price by the number of ounces in each package to arrive at the unit costs by which the packages can be compared.

Testimony before the committee established that present law is inadequate or imprecise to a degree that permits these practices and conditions to flourish unabated. . . . (Emphasis added.)

§ 402 of the WMA, 21 U.S.C. § 672, provides:

Whenever any carcass, part of a carcass, meat or meat food product of cattle, sheep, swine, goats, horses, mules, or other equines, or any product exempted from the definition of a meat food product, or any dead, dying, disabled, or diseased cattle, sheep, swine, goat, or equine is found by any authorized representative

of the Secretary upon any premises where it is held for purposes of, or during or after distribution in, commerce or otherwise subject to subchapter I or II of this chapter, and there is reason to believe that any such article is adulterated or misbranded and is capable of use as human food, or that it has not been inspected, in violation of the provisions of subchapter I of this chapter or of any other Federal law or the laws of any State or Territory, or the District of Columbia, or that such article or animal has been or is intended to be, distributed in violation of any such provisions, it may be detained by such representative for a period not to exceed twenty days, pending action under section 673 of this title or notification of any Federal, State, or other governmental authorities having jurisdiction over such article or animal, and shall not be moved by any person, firm, or corporation from the place at which it is located when so detained, until released by such representative.

. . .

Calif. Bus. and Prof. Code § 12211, as in force during Jones' inspection of respondents' products, provided:[3]

Each sealer shall, from time to time, weigh or measure packages, containers or amounts of commodities sold, or in the process of delivery, in order to determine whether the same contain the quantity or amount represented and whether they are being sold in accordance with law.

The director is hereby authorized and directed to adopt and promulgate necessary rules and regulations

[3] § 12211 was amended in 1973 in a manner not relevant to these proceedings.

governing the procedures to be followed by sealers in connection with the weighing or measuring of amounts of commodities in individual packages or containers or lots of such packages or containers, including the procedures for sampling any such lot, and in determining whether any package or container or a lot of such packages or containers complies with the provisions of this section.

Any such rule or regulation, or amendment thereof, shall be adopted and promulgated by the director in conformity with the provisions of Chapter 4.5 (commencing with Section 11371), of Part 1 of Division 3 of Title 2 of the Government Code; provided, that the average weight or measure of the packages or containers in a lot of any such commodity sampled shall not be less, at the time of sale or offer for sale, than the net weight or measure stated upon the package, and provided further, that said rules or regulations applicable to food, as defined in Section 26450 of the Health and Safety Code, insofar as possible, shall not require higher standards and shall not be more restrictive than regulations, if any, promulgated by the Department of Health, Education, and Welfare, Food and Drug Administration, under the provisions of the Federal Food, Drug and Cosmetic Act.

Any lot or package of any such commodity which conforms to the provisions of this section shall be deemed to be in conformity with the provisions of this division relating to stated net weights or measures.

Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, a less amount than that represented, the sealer shall in writing order same off sale and require

that an accurate statement of quantity be placed on each such package or container before same may be released for sale by the sealer in writing. The sealer may seize as evidence any package or container which is found to contain a less amount than that represented.

Congressional Debates on Enactment of the Wholesome Meat Act:

There is nothing in the Legislative debates on the WMA to indicate that the members of Congress thought that the bill would affect the long established right of the States to regulate with regard to meat products offered for sale to our consumers. A good indication of the congressional view of the respective roles of State and federal governments is found in the comments of Congressman Pirnie, at page 30527 of 113 Congressional Record (1967):

"An editorial in this morning's Washington Post stated clearly what I believe is the mission before us. In referring to the type of legislation needed, the editorial said:

'In our view, there are two major objectives to be sought: (1) The elimination of every pound of unclean or unwholesome meat from the market; (2) Accomplishment of this objective within the framework of our federal system, which often calls for federal aid to help the states perform their local functions instead of mere absorption of those functions by an overextended federal bureaucracy.'

My own state of New York has a meaningful meat inspection program, and has had it for some time; however, there are several states without such a program. In these states, the consumer has no guarantee whatsoever that any meat products processed, packed, and distributed solely within the borders of a state

are wholesome and meet certain minimum health and quality requirements. This meat is not subject to federal inspection because it is not involved in interstate commerce.

The solution to the problem, in my view, is not for the federal government to take over all meat inspection, permitting the states to abandon their responsibilities in this area. Nor should we turn our backs to the matter and let the states fend for themselves. The answer lies somewhere in the middle.

As the committee suggests, let us establish a federal-state partnership. We hear so frequently the term 'creative federalism', let us test its practicality in this regard. By working with the states and agreeing to share the cost and assist in the development of programs on the local level—programs with teeth in them—we will at once make significant progress toward the eventual attainment of the worthy goals outlined in the Post editorial."

Other indicative comments include those of Congressman Latta of Ohio, at page 30509 of 113 Congressional Record (1967):

"The proposed legislation would enhance the state by providing for federal cooperation with appropriate state agencies in developing and administering state meat inspection programs."

At page 30516 of 113 Congressional Record (1967), Congressman Mayne of Iowa remarks:

"The bill . . . is a good bill which will do much to improve meat inspection throughout the United States. Moreover, it will permit state and local governments to perform a necessary role in this important function which is so vital to the health of our country.

I believe there is a proper role for the state governments and local governments under our federal system and that inspection of meat is a function which properly falls within their jurisdiction."

Though the exchange occurred during the discussion of the Conference Committee report, which dealt largely with the proper role of federal inspection of intrastate processing, the discussion between Congressman Gerald Ford of Michigan (now President) and Representative Page Belcher of Oklahoma contains interesting language. At page 35151 of 113 Congressional Record (1967), the following colloquy occurs:

Mr. Gerald R. Ford. Within the past year, in my part of the state of Michigan, we have had a number of serious meat scandals, even under good state legislation. Those accused were prosecuted, both individuals and corporations. Under the state law, a number of convictions were achieved.

I believe we have an excellent state law. As I indicated, when violations of law did occur, convictions were obtained.

Under the conference report, can the State of Michigan continue its program and can it qualify for fifty-percent funding by the federal government?

Mr. Belcher. The fact of the matter is that we invite the state of Michigan and the states of Texas, Oklahoma, Kansas, or Nebraska to do the same thing that Michigan did, and the federal government will pay half of the bill.

I hope—and I believe all the conferees hope—every state will take over the responsibility, together with the federal government, of protecting the people. . . .

President Ford, at least, was led to believe that the State of Michigan could continue its meat inspection program, both of instrastate and interstate meats.

Indeed, the entire Congress was led to believe that the WMA did not intend a revolution in weights and measures enforcement. There is no debate on § 408 itself—had a major change been intended there would have been—and as the above quotations indicate, the Congress clearly intended that the States were to continue their vital role in assuring sale of wholesome (as well as accurately labeled) meat products.[4]

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[4]Adapted from the Brief of the States of Michigan, Arkansas, Oklahoma, Oregon, Texas and West Virginia as Amici Curiae in Support of Petitioners in No. 75-1052.